Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

CHARLES L. WILLIAMS, *ET AL.*,

Petitioners,

v.

NATIONAL BASKETBALL ASSOCIATION, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Sherman Act does not apply to employers who collude to restrain competition in the labor market by fixing wages or terms of employment.

Whether unionization strips employees of their rights under the Sherman Act to challenge employer collusion.

Whether the "nonstatutory" labor exemption should be judicially extended to immunize from the Sherman Act collusion by members of a multiemployer bargaining group after impasse has been reached in collective bargaining.

PARTIES TO THE PROCEEDING

Petitioners are: Charles L. Williams; Charles D. Smith; Daniel R. Manning; Rolando A. Blackman; Mark E. Eaton; Lafayette Lever; Herbert L. Williams; James A. Jackson; Dikembe Mutombo; Glenn A. Rivers; David M. Robinson; Reggie Williams; Eric Anderson; Marty Conlon; Christian Laettner; Adrian Autry and Shawnelle Scott, on behalf of themselves and all persons similarly situated; Eric Mobley; Trevor Ruffin; Dominique Wilkins; Horace Grant; Brian Shaw; Dale Davis; Terrell Brandon; Donyell Marshall and National Basketball Players Association.

Petitioners have no corporate parents or subsidiaries.

Respondents are: National Basketball Association; Atlanta Hawks, L.P.; Capital Bullets Basketball Club, Inc.; Boston Celtics Limited Partnership; Charlotte NBA Limited Partnership; Dallas Basketball Limited; Denver Nuggets Limited Partnership; Detroit Pistons Basketball Company; Golden State Warriors; Rocket Ball, Ltd.; Jazz Basketball Investors, Inc.; LAC Basketball Club, Inc.; Los Angeles Lakers, Inc.; Madison Square Garden Corporation; Meadowlands Basketball Associates; Miami Heat Limited Partnership; Milwaukee Bucks, Inc.; Minnesota Professional Basketball Limited Partnership; Orlando Magic, Ltd.; Pacers Basketball Corporation; Philadelphia 76ers Basketball Club, Inc.; Phoenix Suns Limited Partnership, L.P.; Sacramento Kings Limited Partnership, L.P.; San Antonio Spurs, Ltd.; Ackerley Communications, Inc.; Trail Blazers Inc.; Gund Business Enterprises, Inc. and Chicago Professional Sports Limited Partnership.

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Amicus Br. for the U.S., *NBA v. Williams*, 45 F.3d 684 (2nd Cir. 1995) (No. 94-7709) ..... *passim*

Amicus Br. for the U.S., *Powell v. NFL*, 498 U.S. 1040 (1991) (No. 89-1421), *denying cert. to* 930 F.2d 1293 (8th Cir. 1989) ("*Powell II*") ..... *passim*

Amicus Br. for the U.S., *Brown v. Pro Football, Inc.*, 50 F.3d 1071 (D.C. Cir. 1995) (No. 93-7165),*denying rehearing* to 50 F.3d 1041 (D.C. Cir. 1995) ..... *passim*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles L. Williams, *et al.*, respectfully petition for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 45 F.3d 684 (2nd Cir. 1995) and is reprinted in the Appendix ("App.") to this petition at A1-18. This decision affirmed the judgment of the United States District Court for the Southern District of New York (App. A40a-c). The District Court's opinion is reported at 857 F. Supp. 1069 (S.D.N.Y. 1994). (App. A19-38.)

STATEMENT OF JURISDICTION OF THE COURT

The mandate of the Court of Appeals was issued on January 24, 1995; a timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 24, 1995. (App. A39-40.) On June 6, 1995, Justice Ginsburg

extended the time within which to file a petition for a writ of *certiorari* to and including July 24, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case implicates the Sherman, Clayton, Norris-LaGuardia and Wagner Acts, reprinted at A93-111.

STATEMENT OF THE CASE

This case presents this Court with a prime example of judicial activism gone awry. In an unprecedented decision, the Second Circuit has held that even after collective bargaining negotiations have reached impasse, employers who collude to fix prices and terms of employment in the labor market are immune from antitrust liability so long as their employees have chosen to be represented by a union. The decision distinguishes itself by its utter disregard for this Court's antitrust and labor jurisprudence, the language of the Sherman, Clayton, Norris-LaGuardia and Wagner Acts, and by its failure even to mention this Court's decisions creating—and sharply limiting—the nonstatutory labor exemption from the antitrust laws.

Even more remarkable for a decision that can best be characterized as uninhibited judicial legislation, it constitutes harmful public policy. No less a source than the United States Department of Justice has stated, "[W]e are convinced that such a rule disserves both labor and antitrust interests and that Congress in enacting a worker protection statute never intended it."[1] In fact, the Department, under two administrations, has consistently and vigorously opposed varying forms of this rule as amicus curiae, repeatedly emphasizing both the importance of the issues involved and the grave errors made by all three

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[1] Amicus Br. for the U.S. at 5, *NBA v. Williams*, 45 F.3d 684 (2nd Cir. 1995) (No. 94-7709) (App. A41-47).

Courts of Appeals that have decided those issues.[2] The Chairman of the NLRB recently added his voice to the chorus of criticism, stating that the decisions "eliminated" "any kind of balance between the properly competing policies of labor and antitrust laws" and were "hardly compatible" with the NLRA.[3]

The Second Circuit's decision has already become a harmful precedent; this year, in *Brown v. Pro Football*, 50 F.3d 1041 (D.C. Cir.), *reh'g denied*, 50 F.3d 1071 (D.C. Cir. 1995), the D.C. Circuit followed the Second Circuit.[4] In a powerful dissent, Judge Wald condemned the majority's holding as "pos[ing] a threat to the central purpose of our labor laws of promoting collective bargaining as the primary vehicle for ensuring labor peace" and "neither harmoniz[ing] labor law with antitrust law, nor comport[ing] with the congressional design of our statutory labor law regime." *Id.* at 1059 (Wald, J., dissenting).[5]

The upshot of this rule is that it encourages employers to propose tougher terms in collective bargaining, knowing that if their employees do not submit, they will be able to impose collusively those terms after impasse without fear of antitrust

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[2] *See id.*; Amicus Br. for the U.S., *Powell v. NFL*, 498 U.S. 1040 (1991) (No. 89-1421), *denying cert. to* 930 F.2d 1293 (8th Cir. 1989) ("*Powell II*") (App. A60-79); Amicus Br. for the U.S., *Brown v. Pro Football, Inc.*, 50 F.3d 1071 (D.C. Cir. 1995) (No. 93-7165), *denying rehearing to* 50 F.3d 1041 (D.C. Cir. 1995) (App. A 48-59).

[3] William G. Gould, IV, The Curse of the Bambino, Speech at Hofstra University, Hempstead, N.Y. (April 27, 1995) (transcript available from NLRB) (App. A80-92).

[4] A Petition for Rehearing and Suggestion for Rehearing En Banc in *Brown* was denied with Judge Wald dissenting. Judges Wald and Tatel also stated that these issues merit this Court's review. *See Brown*, 50 F.3d at 1071 (Tatel, J., concurring with denial of rehearing); *id.* (Wald, J., dissenting from denial of rehearing).

[5] Because the petition for *certiorari* in *Brown* is due on September 11, 1995, this Court may wish to consider the petitions in both cases simultaneously.

liability. By providing disincentives for employees to become or remain unionized and for employers to bargain in good faith, the Second Circuit's decision can lead to the devolution of collective bargaining into decertification, litigation and destabilization. Five years ago, the United States predicted that the "unjustified extension of the nonstatutory labor exemption is likely to destabilize labor-management relations and make collective bargaining agreements more difficult to reach."[6] The history of collective bargaining in professional sports since then has validated that prediction, as shown by recent labor strife in football, hockey and basketball. Given the decision's widespread application, similar destabilization in other industries is sure to follow.

* * * *

The twenty-seven member teams ("Teams") of the National Basketball Association ("NBA") brought this action seeking to obtain a rule of law that would be a significant advantage in collective bargaining with the National Basketball Players Association ("Union").[7] When the Teams brought this lawsuit on June 17, 1994, the collective bargaining agreement then in effect was set to expire one week later, on June 24, 1994. The Teams sought a declaration that: an agreement among competing employers to fix wages and terms of employment in the labor market is exempt from antitrust scrutiny under the nonstatutory labor exemption.[8]

The Teams asked the District Court to follow the widely condemned Eighth Circuit decision in *Powell v. NFL*

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[6] Amicus Br. for the U.S. at 18, *Powell v. NFL*, *supra* (App. A77).

[7] The action was brought pursuant to Sections 1 and 2 of the Sherman Act and Section 9(a) of the NLRA in the U.S. District Court for the Southern District of New York, which had jurisdiction based on 28 U.S.C. §§ 1331 and 1337.

[8] The three terms of employment at issue were the "Salary Cap", "College Draft", and "Right of First Refusal", which are defined in the Second Circuit's opinion. (App. A3.)

("Powell II"), 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). *Powell II* held that employers, after impasse, may collude to impose terms of employment on unionized employees, provided that such terms had been previously agreed upon in an expired agreement: "[T]he nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws." *Id.* at 1303.

The District Court granted the Teams' declaration. (App. A37.) On appeal, the Second Circuit more than simply affirmed the District Court; it expanded its holding, reaching far beyond *Powell II* and inventing a radical rule of law. Whereas *Powell II* held that employers may, after impasse, collusively impose terms previously agreed upon by the union, the Second Circuit held that employers may collusively impose *any* terms of employment, whether previously agreed upon or not: "We therefore hold that the antitrust laws do not prohibit employers . . . from implementing their joint proposals in the absence of a [collective bargaining agreement]." (App. A17.)

The reasons for granting the writ urged by the United States in *Powell II* are now even more applicable for granting *certiorari* here. The Second Circuit's decision encompasses all of *Powell II*'s errors and magnifies them by staking out an even more extreme position. The experience of labor strife since *Powell II* highlights the pitfalls of those errors.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for three reasons. *First*, the decision conflicts with this Court's antitrust and labor jurisprudence[9] and ignores the language of the Sherman, Clayton, Wagner and Norris-LaGuardia Acts. *See infra*, Sec. I. *Second*, it creates a conflict with the Eighth Circuit's decision

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[9] The United States, in urging rehearing in *Brown*, stated, "The sweeping antitrust immunity adopted by the majority has no support in Supreme Court precedent." Amicus Br. for the U.S. at 5, *Brown*, *supra* (App. A52).

in *Powell II*. *See infra*, Sec. II. *Third*, it thoroughly undermines both antitrust enforcement and federal labor policy, implicating important public policy concerns that extend well beyond professional sports. *See infra*, Sec. III.

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE PLAIN LANGUAGE OF THE STATUTES.

The Second Circuit's decision is founded on three assumptions; if any is wrong, the rationale for the entire decision collapses. *First*, the Second Circuit assumes that there has long been "some kind of general understanding" that the Sherman Act tacitly permits combinations of employers to fix wages and terms of employment. (App. A11.) This Court's decisions easily refute that notion. *Second*, the Second Circuit assumes that even if the Sherman Act did prohibit employer collusion in the labor market, the enactment of the Wagner Act effectively repealed the Sherman Act's prohibition of such practices. (App. A12.) Nothing in the Wagner Act supports that proposition—one which is particularly implausible given its reliance on a statutory scheme "meant to enhance workers' rights to unionize" in order to justify withdrawal of unionized employees' antitrust rights as against employer collusion to reduce wages. *See* Amicus Br. for the U.S. at 8, *Brown*, *supra* (App. A55). *Third*, the Second Circuit assumes that it is free to define the scope of the nonstatutory labor exemption from the antitrust laws as broadly as it wishes. The decisions of this Court that create and narrowly limit the scope of the nonstatutory exemption—and go unmentioned by the Second Circuit—dispose of that notion completely.

All three pillars of the decision crumble under the pressure of contrary case law and statutory language.

A. Contrary to the Second Circuit's decision, the Sherman Act has long prohibited employer collusion in the labor market.

The decision rests "strongly" and "importantly" (App. A7) on the proposition that a supposed lack of any challenge to

employer collusion in the labor market "for a century" (App. A11) suggests that the Sherman Act was never intended to apply in such situations. That notion is demonstrably wrong. Not only is it contrary to the language of the Sherman Act, but it is invented out of whole cloth in disregard of this Court's antitrust jurisprudence.[10] Even a brief review of the Sherman Act and its application reveals no "general understanding" (App. A11) that the antitrust laws tacitly permit employers collusively to fix wages and terms of employment. *See Brown*, 50 F.3d at 1059 (Wald, J., dissenting); Amicus Br. for the U.S., *Williams*, *supra* (App. A41-47); Amicus Br. for the U.S., *Brown*, *supra* (App. A48-59).

Nothing in the Sherman Act indicates that it does not apply to multiemployer groups.[11] Shortly after its passage in 1890, this Court held that the Act prohibited combinations of labor, as well as of capital. In the "Danbury Hatters" case, *Loewe v. Lawlor*, 208 U.S. 274, 292 (1908), efforts by the AFL to unionize workers through boycotts and picketing were held to violate the Sherman Act. *See also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 438 (1911) (Sherman Act outlawed "any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or . . . labor").

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[10] The decision states that, following passage of the Sherman Act in 1890, "[W]e find during the 104 succeeding years not a single instance, prior to this very case, of a union or an individual employee asserting the stark claim that the routine practices of multiemployer bargaining violate the antitrust laws." (App. A9.) Even in this case, the players do not claim that multiemployer *bargaining* practices violate the antitrust laws. Neither the Teams nor the players have even raised as an issue in this case the lawfulness of employers meeting to devise proposals for presentation during the course of bargaining, to present such proposals, or to agree collectively whether to accept proposals by a union. What is at issue here is non-bargaining conduct: whether competing employers may collude to impose terms and conditions of employment on their employees. *See Brown*, 50 F.3d at 1066-70 (Wald, J., dissenting).

[11] The Sherman Act expressly prohibits "[*e*]*very* contract, combination . . . or conspiracy in restraint of trade or commerce." 15 U.S.C. § 1 (emphasis added) (App. A93).

From 1890 to 1914, federal courts issued 101 antitrust injunctions against unions. 51 CONG. REC. 9172-74 (1914). It is inconceivable, then, that the Sherman Act would have acted to bar combinations of workers attempting to fix the price of labor but *not* combinations of employers, as the Second Circuit suggests.

The primary obstacle to the application of the Sherman Act to both unions and employers was that labor disputes in specific industries were then generally not considered to implicate "interstate commerce." *See, e.g., United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 410-11 (1922); *United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 471 (1924). This—not a "general understanding" that multiemployer collusion was not barred by the Sherman Act—explains the relative dearth of early Sherman Act cases brought against multiemployer collusion.

Indeed, this Court's decisions in *Industrial Ass'n v. United States*, 268 U.S. 64 (1925), and *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926), prove that the Sherman Act did apply to multiemployer groups. In *Industrial Ass'n*, the United States sued to enjoin an *employers'* association that controlled the construction industry in San Francisco, contending that an agreement among employers each to hire at least one nonunion employee in response to union activity (strikes, boycotts and "acts of violence against persons and property") violated the Sherman Act. *Industrial Ass'n*, 268 U.S. at 72-74. This Court disagreed, *not* on the ground that collusion by employers was not covered by the Sherman Act, but because the behavior at issue did not affect interstate commerce. *Id.* at 77.

Industrial Ass'n is exactly the sort of case the Second Circuit claims does not exist—one in which a party (indeed, the United States) sued a combination of employers under the Sherman Act for colluding to set terms of employment. (*See* App. A9.) Thus, *Industrial Ass'n* conclusively demonstrates that the United States in 1925 understood the Sherman Act to prohibit multiemployer associations from colluding to fix wages or other terms of employment.

Anderson, decided in the term following *Industrial Ass'n*, is completely irreconcilable with the decision below, which makes no attempt to distinguish it. *Anderson* holds that a unionized employee may sue, under the Sherman and Clayton Acts, members of a multiemployer bargaining association who collude to "fix the wages which shall be paid" and other terms of employment. *Anderson*, 272 U.S. at 362. The Second Circuit here held that unionized employees may *never* do so, regardless of the nature, intent or effect of the collusion involved.

In *Anderson*, a member of a seaman's union brought an antitrust action against associations controlling the employment of Pacific coast seamen. In particular, the complaint alleged that the employers had established rules requiring that "every seaman seeking employment is compelled to register, receive a number and await his turn according to the number, before he can obtain employment", *id.* at 361, and that "the associations fix the wages which shall be paid the seamen", *id.* at 362. Following the rule of *Coronado Coal*, *Herkert & Meisel Trunk*, and *Industrial Ass'n*, the Ninth Circuit affirmed dismissal of the complaint on the ground that the challenged conduct was "at most an indirect and incidental impediment to the transaction of interstate commerce". *Anderson*, 10 F.2d 96, 97 (9th Cir. 1926). This Court reversed, holding that "ships and those who operate them are instrumentalities of commerce and within the Commerce Clause no less than cargoes", 272 U.S. at 363, and explicitly distinguishing its prior precedents as "not in point[; t]he conspiracies or combinations in all three related to local matters. . . .", *id.* at 363-64. Having disposed of the interstate commerce hurdle, this Court did not hesitate to hold that the concerted imposition by a multiemployer association of wages and other terms of employment violated the Sherman Act:

> "[A]s was said by this Court in *United States v. Colgate & Co.*, 250 U.S. 300, 307 [1919], 'The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade.' That the effect of the

> combination now under consideration, both as to the seamen and the owners, is precisely what this language condemns, is made plain by the allegations of the bill which we have just summarized. . . . *It is not important, therefore, to inquire whether, as contended by respondents, the object of the combination was merely to regulate the employment of men and not to restrain commerce.*"

Id. at 363 (emphasis added).

Thus, not only do *Anderson* and *Industrial Ass'n* contradict the Second Circuit's major premise, but the absence of numerous antitrust challenges to employer collusion—even during collective bargaining—has nothing to do with multiemployer bargaining; instead, it resulted solely from the now-defunct view that:

> "Neither the making of goods nor the mining of coal is commerce; and the fact that the things produced are afterwards shipped or used in interstate commerce does not make their production a part of it. Nor is building commerce; and the fact that the materials to be used are shipped in from other states does not make building a part of such interstate commerce."

Anderson, 272 U.S. at 364 (distinguishing other cases); *see also Aeolian Co. v. Fischer*, 40 F.2d 189, 194 (2nd Cir. 1930) (A. Hand, J., concurring) ("Mining is not interstate commerce. Manufacturing is not interstate commerce. Building is not interstate commerce.") (citations omitted). In yesterday's world, in which mining, manufacturing, building and even baseball, *see Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208-09 (1922), were not considered interstate commerce, it can hardly be surprising that unions launched no antitrust challenges to concerted employer action fixing wages and terms of employment. In today's world in which mining, manufacturing, building, and basketball (*see Haywood v. NBA*, 401 U.S. 1204, 1205 (1971) (Douglas, J., in chambers) ("Basketball . . . does not enjoy exemption from the antitrust laws") undeniably constitute interstate commerce, there is, as in *Anderson*, no reason whatsoever to conclude that the

Sherman Act does not apply to concerted price-fixing by groups of employers. *See also* Amicus Br. for the U.S., *Brown*, *supra* (App. A48-59).

Anderson's rule that the antitrust laws have no special exception for restraints of trade directed by multiemployer associations against employees—even unionized employees—has been followed from the moment of its adoption until the present day.[12]

The Second Circuit's proposition that there was a "general understanding" that collusive employer action to fix wages and employment terms was exempt from the Sherman Act—is fiction. (App. A11.)[13] Not even the Teams have claimed this. The general understanding was, if anything, precisely the opposite. Efforts by multiemployer associations, like efforts by unions until exempted by the Clayton Act, to fix wages or other terms of employment, have historically been considered to *violate* the Sherman Act, so long as an effect on interstate commerce is demonstrated.

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[12] *See, e.g., Radovich v. NFL*, 352 U.S. 445, 453-54 (1957) (multiemployer agreement to common terms for players); *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 742-43 (9th Cir. 1984) (multiemployer agreement not to hire "whistleblowers"), *cert. dismissed*, 469 U.S. 1200 (1985); *Quinonez v. National Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 827-28 (5th Cir. 1976) (multiemployer blacklisting agreement); *Nichols v. Spencer Int'l Press*, 371 F.2d 332, 334 (7th Cir. 1967) (multiemployer agreement restricting mobility of employees); *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970) (multiemployer action to suppress compensation), *later opinion sub nom., Jacobi v. Bache & Co.*, 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

[13] This is confirmed by the legislative history of the Sherman Act. It was assumed that the Act covered multiemployer groups; the debate was over whether it covered unions as well. *See* 21 CONG. REC. 2726-27 (1890) (statement of Sen. Edmunds, Chairman, Judiciary Comm.).

B. Contrary to the Second Circuit's decision, the federal labor laws did not repeal the application of the antitrust laws to employer collusion in the labor market.

The Second Circuit also assumes that "whatever doubt might have existed as to Congress' intent [to apply the antitrust laws to employer collusion in the labor market] was entirely eliminated by the passage of federal labor laws." (App. A12.) To the contrary, the language of the Wagner Act of 1935 embodies no such principle. (App. A98-111.) The Second Circuit is unable to cite to any language or intent inherent in the Wagner Act, or any other federal labor law, that lends support to its view.

In fact, the Second Circuit has subverted the purpose behind the federal labor laws. The labor laws were designed to "enhance workers' rights to unionize" and to strengthen their ability to counter the economic power of employers in dictating wages and terms of employment. Amicus Br. for the U.S. at 8, *Brown*, *supra* (App. A55); *see also* Amicus Br. for the U.S. at 13-14, *Powell v. NFL*, *supra* (App. A73-74). That legislation cannot justify the repeal of employee antitrust rights as against employer collusion to reduce wages, nor does it reflect any intent "to create a sweeping pro-management antitrust exemption which workers can avoid only by avoiding unions." Amicus Br. for the U.S. at 8, *Brown*, *supra* (App. A55); *see also Brown*, 50 F.3d at 1064 (Wald, J., dissenting).

The federal labor laws neither curtail nor repeal the antitrust laws; they do not hinder the ability of employees to seek antitrust relief against their employers as contemplated by *Anderson*. As the United States concluded in urging that this Court grant *certiorari* in and reverse *Powell II*:

> "Neither the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no

> intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship—rights that presumably would continue to exist for other, non-unionized workers. To the contrary, the predominant thrust of the statute (and of related enactments such as the Norris-LaGuardia Act) is to expand the protection afforded employees."

Amicus Br. for the U.S. at 13-14, *Powell v. NFL*, *supra*. (App. A73-74); *see also* Amicus Br. for the U.S. at 3, *Williams*, *supra* (App. A44).[14]

The Second Circuit's notion that the federal labor laws somehow removed employee rights to antitrust relief against employers appears to be another example of its overactive historical revisionism. To paraphrase Justice Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905), the Wagner Act does not enact Professor Winter's law review article.[15] The *only* support the Second Circuit purports to rely on for the curtailment of antitrust rights by federal labor law lies nowhere in the labor law. Instead, it purports to rely entirely on a decision of this Court having *nothing* to do with antitrust law.

In particular, the Second Circuit relies in great part on *NLRB v. Truck Drivers Local 449* ("*Buffalo Linen*"), 353 U.S. 87 (1957), concluding that it "cannot be reconciled with appellants' antitrust claim." (App. A16.) *Buffalo Linen* has nothing to do with the antitrust laws; no antitrust claim was raised or mentioned in that case. *Buffalo Linen* merely holds that under the NLRA a multiemployer group may engage in a defensive lockout without committing an unfair labor practice. *Id.* at 92-93. *Buffalo Linen* sheds no light on the issue presented

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[14] The legislative history of the Wagner Act makes clear that it was intended to expand the rights of labor. *See*, *e.g.*, 79 CONG REC. 7565-66 (1935).

[15] *See* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE LJ. 1 (1971).

in this case: how are the antitrust laws to be balanced with federal labor policy when the two are purportedly in conflict.[16]

C. The Second Circuit has ignored and contravened this Court's jurisprudence creating, defining and limiting the nonstatutory labor exemption.

This Court has indicated, in its nonstatutory labor exemption jurisprudence, how antitrust and labor policy must be balanced when the two do conflict. The Second Circuit, however, ignored that entire body of law, even though it governs the central question in this case: when and how should the courts imply an exemption from the Sherman Act based on labor law? As Judge Wald noted in her dissent in *Brown*:

> "The majority characterizes the players' position as an ill-begotten effort to 'import' and 'inject' antitrust principles into collective bargaining. . . . This of course turns the question inside-out. Historically and logically, antitrust comes first; the antitrust statutes antedate our labor laws and are of general applicability, applying to labor markets unless some statutory or judge-made exemption creates an exception."

50 F.3d at 1059 n.1 (Wald, J., dissenting).

This Court's jurisprudence makes clear that the nonstatutory exemption is predicated upon the existence of a bona fide agreement between labor and management. By extending the nonstatutory exemption where there is an express *lack* of agreement, as in this case, the Second Circuit's decision is irreconcilable with this Court's nonstatutory exemption jurisprudence. As the United States noted in support of rehearing in *Brown*:

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[16] Precisely because the collusive employer conduct at issue here is not bargaining conduct, but the direct fixing of terms and conditions of employment, the antitrust concerns are particularly strong, whereas the labor concerns are nonexistent. No case or statute suggests that the ability of employers collusively to fix wages is an important feature of collective bargaining. *See Brown*, 50 F.3d at 1067 (Wald, J., dissenting).

> "The results of the various cases addressed by the Supreme Court have been equally unequivocal: collective bargaining agreements immediately promoting the unions' interests in eliminating competition based on wages and working conditions have been uniformly upheld, while those based on employer interests (including interests in their competitors' employment standards) have been rejected."

Amicus Br. for the U.S. at 6, *Brown*, *supra* (citations omitted) (App. A53).

The nonstatutory labor exemption has its origins in the "statutory" exemption from the antitrust laws. In response to decisions applying the Sherman Act to outlaw collective action by workers (*see supra* at 7), Congress enacted Sections 6 and 20 of the Clayton Act and section 4 of the Norris-LaGuardia Act. 15 U.S.C. § 17; 29 U.S.C. § 52; 29 U.S.C. § 104. (App. A94-97.) *See United States v. Hutcheson*, 312 U.S. 219, 231 (1941). Collectively, they form the "statutory" labor exemption to the Sherman Act. That exemption applies only to the conduct of organized labor, and only "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." *Id.* at 232. Thus, the statutory exemption arose from Congress's deliberate and repeated efforts to protect organized labor from the reach of the Sherman Act.[17]

However, the statutory exemption immunizes only the conduct of unions and their members—not agreements between labor and management. *See United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965). Absent further protection from the antitrust laws, labor unions would not be able to fulfill their role in collective bargaining, because every collective bargaining agreement setting terms and conditions of employment could be attacked as collusion in restraint of trade.

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[17] The legislative histories of the Clayton and Norris-LaGuardia Acts confirm that the statutory exemption was enacted to protect the rights of labor. *See* James M. Altman, *Antitrust: A New Tool For Organized Labor?*, 131 U. PA. L. REV. 127, 150 (1982) (Clayton Act); S. REP. NO. 163, 72d CONG., 1ST SESS. 5 (1932) (Norris-LaGuardia Act).

Thus, in a series of cases spanning thirty years,[18] the Supreme Court has created a limited immunity for certain collective bargaining agreements, known as the "nonstatutory" labor exemption.[19]

The law is clear that courts may create exceptions to statutes only to the minimum extent necessary. "It is a cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). This Court has "repeatedly established that there is a heavy presumption against implicit exceptions" to the Sherman Act. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *see also Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). As the United States stated in its amicus brief in *Brown*:

> "Creation of a new implied antitrust immunity under the NLRA is a form of implied repeal. It is 'well-established' that such repeal 'is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. . . . Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary.'"

Amicus Br. for the U.S. at 8, *Brown*, *supra* (App. A54), *quoting National Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378, 388-

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[18] *See Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *United States v. Women's Sportswear Mfrs'. Ass'n.*, 336 U.S. 460 (1949); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S 797 (1945).

[19] The exemption applies derivatively to employers who enter into agreements with unions because, as the Eighth Circuit explained in *Mackey v. NFL*, a contrary result "'would undermine the vitality of the exemption by discouraging bargaining on the part of management'", 543 F.2d 606, 612 n.10 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (*quoting Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3rd Cir. 1974)); *accord Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

89 (1981) (internal citations omitted). The Second Circuit made no reference to these cases regarding exemptions generally or Sherman Act exemptions specifically.

This Court has created a nonstatutory labor exemption of extremely limited application. In fact, this Court has applied the nonstatutory exemption to immunize collusive conduct only once, in *Jewel Tea*. By limiting the application of the nonstatutory exemption to only *agreements* between labor and management, this Court has enabled fairly negotiated collective bargaining agreements to receive the requisite shelter from collateral attack under the antitrust laws, while ensuring that the judicially-created exception is, as required, narrowly drawn.

In its first nonstatutory labor exemption case, *Allen Bradley*, this Court recognized in principle that "agreements" between unions and employers that might otherwise violate the Sherman Act might be exempt from antitrust scrutiny if "immunized by the participation of the union." 325 U.S. at 799-800. Nevertheless, the agreements were held to be *not* exempt because "[a] business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Id.* at 811.

Four years later, in *Women's Sportswear*, this Court refused to extend the nonstatutory exemption where women's sportswear jobbers agreed to employ, with limited exceptions, only those stitching contractors who were unionized and were members of a particular trade association. 336 U.S. at 462-63. In so holding, this Court recognized that even though the agreement included labor provisions, "benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *Id.*, *citing Allen Bradley*. Similarly, in *Pennington*, this Court refused to extend the nonstatutory exemption to an agreement between the United Mine Workers and larger coal operators to eliminate smaller coal operators by imposing the terms of the 1950 National Bituminous Coal Wage Agreement regardless of ability to pay. 381 U.S. at 663.

That same day, this Court decided *Jewel Tea*. In this Court's only decision actually immunizing collusive conduct pursuant to the nonstatutory exemption, an agreement among Chicago area grocers and supermarkets and the butchers' union that supermarket meat departments would not be open in the evening was shielded by the nonstatutory exemption. 381 U.S. at 691. Justice White's plurality opinion emphasized that the labor exemption protected the union's successful efforts to obtain an agreement "through bona fide, arm's length bargaining in pursuit of their own labor union policies. . . ." *Id.* at 690.

In *Connell Construction*, this Court refused to extend the immunity of the nonstatutory exemption to an agreement between the union and a multiemployer group that excluded nonunion subcontractors from a portion of the market, because "[t]his kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." 421 U.S. at 625.[20]

Thus, this Court's decisions creating and limiting the nonstatutory exemption require the existence of union *agreement* to trigger the nonstatutory exemption. Even then, the Court has been remarkably chary in allowing the implied exemption it created to contravene Congress's clear directive in the Sherman Act, doing so only when vital to permit labor unions to enter into bona fide collective bargaining agreements and to protect union interests.

By failing to review—even cursorily—this Court's nonstatutory exemption jurisprudence, the Second Circuit has

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[20] Subsequent courts have also consistently recognized that the nonstatutory exemption is a protection for the product of the collective bargaining process that cannot be invoked without union consent. *See, e.g. Mackey*, F.2d at 616; *Smith v. Pro Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part and rev'd in part on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978); *Robertson v. NBA*, 389 F. Supp. 867, 884-85 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 499-500 (E.D. Pa. 1972) (Higginbotham, J.).

flouted the express holdings of this Court, which limit the nonstatutory labor exemption to shield only certain types of bona fide agreements between labor and management. Extending the exemption as the Second Circuit has done takes an exemption designed to *protect* labor's role in negotiating agreements and twists it to empower management to impose terms of employment the union has *rejected*. *See Cordova*, 321 F. Supp. at 606 (Mansfield, J.) ("Samuel Gompers . . . would probably turn in his grave if he were credited with urging an exemption that would permit employers jointly and unilaterally to reduce wages of their employees.").

II. THE SECOND CIRCUIT'S DECISION CREATES A SPLIT AMONG THE CIRCUITS.

Three circuits have now considered this issue, and the decisions are split between the Eighth Circuit on the one hand and the Second Circuit, which was followed by the D.C. Circuit, on the other. Although we believe all three decisions are erroneous, the Eighth Circuit at least paid lip service to this Court's decisions concerning the nonstatutory exemption by extending the scope of the exemption past impasse only to terms to which the union had once agreed. The Second and D.C. Circuits completely ignored this Court's nonstatutory exemption decisions and immunized all employer collusion, regardless of whether the terms imposed had ever received union consent.

The rule in the Eighth Circuit is set out in *Mackey* and *Powell II*. As noted previously, the Eighth Circuit in *Mackey* held that the nonstatutory exemption immunizes only those employment practices agreed to by a union. *Mackey*, 543 F.2d at 614. Indeed, based on a close reading of this Court's precedents, the Eighth Circuit refused to apply the nonstatutory exemption in *Mackey* even though an agreement existed because it concluded that the agreement was not bona fide, but—like the agreements in *Women's Sportswear*—had been coerced by the employers. *Mackey*, 543 F.2d at 615-16. The court explicitly refused to decide, as irrelevant on the facts, "whether the effect of an agreement extends beyond its formal

expiration date for purposes of the labor exemption." *Id.* at 616 n.18.

The Eighth Circuit in *Powell II* reached the question it had reserved in *Mackey*. At issue in *Powell II* was the NFL's continued implementation of terms of employment that had been agreed to by the union in the expired collective bargaining agreement. The district court had held that "proper accommodation of labor and antitrust interests requires that a labor exemption related to a mandatory bargaining subject survive expiration of the collective bargaining agreement until the parties reach impasse as to that issue." *Powell v. NFL ("Powell I")*, 678 F. Supp. 777, 788 (D. Minn. 1988).

The Eighth Circuit reversed *Powell I* in *Powell II*, holding that employers are entitled to a nonstatutory exemption with regard to the collusive imposition of previously agreed-upon terms upon a mere showing that the union is involved in an "ongoing collective bargaining relationship" with the employers. *Powell II*, 930 F.2d at 1303.

In his dissent from denial of rehearing en banc, Chief Judge Lay explained the fundamental error of the *Powell II* court:

> "This court's *Mackey* decision, which I authored in 1976 and which then Chief Judge Floyd Gibson and Judge William Webster joined, declared 'the policy favoring collective bargaining is furthered *to the degree necessary* to override the antitrust laws *only* where the agreement sought to be exempted is the product of bona fide arm's length collective bargaining.' [543 F.2d] at 614 (emphasis added). *Mackey* is founded on the principles that an employer's exemption owes its existence to union consent, and is aimed at preserving the integrity of the negotiating process."

930 F.2d at 1308.

In a sense, *Powell II* did not depart entirely from the baseline that union consent justified the nonstatutory labor exemption. The *Powell II* decision extended the nonstatutory exemption only to previously agreed-upon terms, requiring that

the union had to have agreed to the terms of employment at one time. *Id.* at 1303 (the challenged practice, "a mandatory subject of collective bargaining, was twice set forth in collective bargaining agreements negotiated in good faith and at arm's-length"). As a result, under *Powell II*, employers are limited in the amount of antitrust immunity they receive, because they cannot impose terms of employment that did not have prior union agreement.

The decision of the Second Circuit in this case completely eradicates *any* requirement of union consent by extending the nonstatutory exemption to *all* collusion by employers to impose terms of employment on their workers. (App. A17.) The D.C. Circuit in *Brown* followed the Second Circuit's broad holding. 50 F.3d at 1053, 1058.

The Second Circuit's holding reaches far beyond the Eighth Circuit's in expanding the nonstatutory exemption, flouting this Court's repeated admonishments that Sherman Act exemptions—in particular the nonstatutory exemption—must be construed narrowly. By dispensing with union consent altogether, the Second Circuit has transformed the nonstatutory exemption from a doctrine intended to protect the ability of unions to enter into collective bargaining agreements into a potent weapon in management's arsenal, allowing employers to collude to dictate terms *never* before agreed to by workers.

III. THE SECOND CIRCUIT'S DECISION CONSTITUTES HARMFUL PUBLIC POLICY ON AN ISSUE OF PARAMOUNT PUBLIC IMPORTANCE.

The responsibility of legislating—choosing among public policy alternatives—is the domain of Congress, not the courts. As the United States as amicus in *Powell* stated:

> "As a policy judgment, Congress could reasonably conclude that so comprehensive [a nonstatutory labor] exemption is desirable and should be enacted. But the role of the courts is not similarly to choose among rational predictive policy

> alternatives; it is instead to fashion an implied exception no broader than clearly necessary to the successful functioning of the statutory scheme."

Amicus Br. for the U.S. at 14, *Powell v. NFL*, *supra* (App. A74).

Regardless of the wisdom from a policy standpoint of the Second Circuit's expansive judge-made antitrust immunity for employer collusion in the labor market, it is improper because it exceeds the bounds of the court's role in avoiding judicial legislation, particularly when it conflicts with established law and statutory language.

Furthermore, this decision has harmful public policy ramifications for labor-management relations in *all* industries. By changing dramatically the incentives for both labor and management in collective bargaining negotiations, it precipitously decreases the likelihood of negotiated agreements and encourages labor strife. That much was true even when the Eighth Circuit decided *Powell II*, a decision that was met with a maelstrom of criticism, including that of the United States, in its brief urging this Court to grant *certiorari*:

> "[T]he court of appeals' error is a matter of serious consequence. Its unjustified extension of the nonstatutory labor exemption is likely to destabilize labor-management relations and make collective bargaining agreements more difficult to reach."

Amicus Br. for the U.S. at 18, *Powell v. NFL*, *supra* (App. A77).[21]

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[21] The *Powell II* decision has been roundly criticized by commentators. *See, e.g.*, Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874 (1991); Keiran M. Corcoran, Note, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1068-69 (1994); Ethan Lock, *Powell v. National Football League: The Eighth Circuit Sacks the National Football League Players Association*, 67 DENV. U.L. REV. 135 (1990); Jonathan S. Shapiro, Note, *Warming the Bench: The Nonstatutory Labor Exemption in the National Football League*, 61 FORDHAM L. REV.

The United States' predictions of destabilization in labor-management relations have turned out to be prescient. Following *Powell II*, the football players decertified their union and litigated for five years. As this petition is filed, the Teams have initiated a lockout, and a faction of basketball players are seeking to decertify the Union in order to bring a new suit against the Teams in federal court under the antitrust laws. *Ewing v. NBA*, D. Minn, Civ. No. 4-95-441 (Doty), filed June 28, 1995. Other professional sports have experienced similar problems in labor-management relations, such as the hockey lockout and the baseball strike (the baseball antitrust exemption, "an exception and an anomaly" (*Flood v. Kuhn*, 407 U.S. 258, 282 (1972)) creates a similar result to the Second Circuit's decision here).

The expanded holding of the Second Circuit poses even more serious issues of public importance than did *Powell II*, because it does not limit the immunized conduct to previously agreed-upon terms of employment. The decision has several consequences. *First*, it changes employers' incentives to bargain by giving them a new weapon: the ability to "execute an end run around the antitrust laws." *Brown*, 50 F.3d at 1069 (Wald, J., dissenting). The rule "gives multiemployer groups both renewed incentives and unprecedented power to impose industry-wide terms of employment regardless of union consent and without fear of antitrust liability." *Id.* at 1059. Thus, it encourages employers to "harden their bargaining positions," secure in the knowledge that if their employees do not submit, they will be always able to impose their terms after impasse. *Id.* at 1064. What employers cannot achieve by the hard bargaining contemplated by the NLRA, the Second Circuit has guaranteed

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1203, 1224 (1993); Glen St. Louis, *Keeping the Playing Field Level: The Implications, Effects and Application of the Nonstatutory Labor Exemption on the 1994 National Basketball Association Collective Bargaining Process*, 1993 DET. C.L. REV. 1221 (1993).

them by way of an antitrust exemption amounting to employer *carte blanche* to collude in the labor market.[22]

Second, it changes employees' incentives to bargain because whatever terms they reject may ultimately be imposed on them anyway, without their having recourse to the antitrust laws. This encourages the undesirable possibility of employees decertifying their union, as the only means of attempting to obtain antitrust relief in court. As Judge Wald stated,

> "Employees in a weak bargaining position will likely opt in favor of clinging to antitrust protection as the less risky course of action; these employees will henceforth have powerful incentives not to engage in collective bargaining at all, since any collective bargaining opens the door to employer imposition of labor market restraints if bargaining fails."

Brown, 50 F.3d at 1059 (Wald, J. dissenting).

Third, the rule encourages employers to go through the motions of collective bargaining so that they may position themselves to impose their terms at impasse. While such behavior is technically in violation of federal labor laws as bargaining in "bad faith," it is "often difficult to detect." *Seattle-First Nat'l Bank v. NLRB*, 638 F.2d 1221, 1227 n.9 (9th Cir. 1981). Although the Second Circuit's decision does not expressly legitimize bad faith bargaining, it certainly encourages it.[23]

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[22] The Second Circuit's decision to repeal partially the antitrust laws, which were designed to protect free competition, makes particularly little sense in professional basketball—an industry in which the employees have always individually bargained for their own individual wages, as opposed to an industry in which all wages are set by collective bargaining.

[23] Contrary to the Second Circuit's supposition (App. A7), the players do not contend that after impasse, the only legitimate employment terms would be those imposed by employees in concert. Instead, upon expiration of the nonstatutory exemption, each employer would be free to set its own wages and terms of employment, whereas collusion among employers to fix wages and terms of employment would be illegal pursuant to the Sherman

When employers are encouraged to bargain harder and employees to decertify their union, the result is likely to be impasse, lockout, and strike. "A rule that ousts antitrust law only to encourage fewer collective bargaining agreements seems contrary to the purposes of both the labor laws and the antitrust laws." *Brown*, 50 F.3d at 1066 (Wald, J. dissenting).[24]

The criticism is not limited to the United States Department of Justice and Judge Wald. In a recent speech, the Chairman of the NLRB, William B. Gould, IV, condemned the Second and D.C. Circuits' decisions as well:

> "The result of [these two decisions] is that, as Judge Wald properly noted while dissenting in the recent *Brown v. Pro Football, Inc.* case, the non-statutory labor exemption becomes available only under 'bizarre' circumstances, i.e., where the union pretends to eliminate itself altogether as the National Football League Players Association did in the wake of the 1987 strike—and as the National Basketball Players Association threatened to do—and then uses the antitrust laws as a vehicle to revive itself for the purpose of negotiating a new agreement and the consequent labor exemption.
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> "The other major result of [these decisions] is that any kind of balance between the properly competing policies of labor and antitrust laws is eliminated altogether . . . thereby

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Act.

[24] An amicus brief filed in the Second Circuit in this case by the Consumer Federation of America and Sports Fans United (representing consumers of professional sports entertainment) points out that the rule adopted by the Second Circuit harms the interests of consumers as well. By promoting labor strife and by repealing the antitrust laws' protection of competition, the decision reduces the amount and quality of professional sports entertainment. Labor strife also severely injures restaurants, vendors and others whose livelihoods depend on professional sports. *See* Lynette Holloway, *If They Play It, Will Fans Come?*, N.Y. TIMES, March 31, 1995, at B1; William Gildea, *Outside the Stadium, Shutdowns Hit Hard; Other Businesses Feeling the Pain of Baseball, Hockey Work Stoppages*, WASH. POST, October 8, 1994, at A1.

> creating an incentive for the players in the major professional sports to be non-union and for employers to foster unionized relationships regardless of their bona fide origin or status—a result which is hardly compatible with the promotion of freedom of association, collective bargaining and autonomous labor-management relationships—goals all enshrined in the National Labor Relations Act."

Gould, *supra* (App. A86).

Gone is any sense of balance in collective bargaining. The Second Circuit's rule encourages employers in all industries to propose their toughest terms, to stonewall until impasse and then to impose those terms of employment in collusion while the employees contemplate decertifying their union with all the resulting destabilization. As a legal matter, it represents the worst kind of judicial legislation; it rewrites antitrust and labor jurisprudence and countermands federal statutes and established precedent--and does so without reference to either. As a matter of public policy, it subverts the labor laws by discouraging unionization and undermines the antitrust laws by legalizing collusion. The gradual erosion by overzealous judges of statutory schemes through "nonstatutory" means has hurt this country before; it is time for this game to end.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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July 24, 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 761—August Term, 1994

(Argued: September 22, 1994

Decided: January 24, 1995)

Docket No. 94-7709

National Basketball Association; Atlanta Hawks, L.P.; Capital Bullets Basketball Club, Inc.; Boston Celtics Limited Partnership; Charlotte NBA Limited Partnership; Dallas Basketball Limited; Denver Nuggets Limited Partnership; Detroit Pistons Basketball Company; Golden State Warriors; Rocket Ball, Ltd.; Jazz Basketball Investors, Inc.; LAC Basketball Club, Inc.; Los Angeles Lakers, Inc.; Madison Square Garden Corporation; Meadowlands Basketball Associates; Miami Heat Limited Partnership; Milwaukee Bucks, Inc.; Minnesota Professional Basketball Limited Partnership; Orlando Magic, Ltd.; Pacers Basketball Corporation; Philadelphia 76ers Basketball Club, Inc.; Phoenix Suns Limited Partnership, L.P.; Sacramento Kings Limited Partnership, L.P.; San Antonio Spurs, Ltd.; Ackerley Communications, Inc.; Trail Blazers Inc. and Gund Business Enterprises, Inc., *Plaintiffs-Counterclaim-Defendants-Appellees,*

Chicago Professional Sports Limited Partnership, *Counterclaim-Defendant-Appellee,*

v.

Charles L. Williams; Charles D. Smith; Daniel R. Manning; Rolando A. Blackman; Mark E. Eaton; Lafayette Lever; Herbert L. Williams; James A. Jackson; Dikembe Mutombo; Glenn A.

Rivers; David M. Robinson; Reggie Williams; Eric Anderson; Marty Conlon; Christian Laettner; Adrian Autry and Shawnelle Scott, on behalf of themselves and all persons similarly situated, *Defendants-Counterclaim-Plaintiffs-Appellants,*

Eric Mobley and Trevor Ruffin, *Defendants-Appellants,*

Dominique Wilkins; Horace Grant; Brian Shaw; Dale Davis; Terrell Brandon; Donyell Marshall and National Basketball Players Association, *Counterclaim-Plaintiffs-Appellants.*

Argued Sept. 22, 1994
Decided Jan. 24, 1995

Before: Winter, Pratt, and Calabresi, *Circuit Judges*

Winter, *Circuit Judge:*

Appellants, who are professional basketball players and their union, appeal Judge Duffy's dismissal of their counterclaim and grant of declaratory relief to the National Basketball Association (the "NBA") and its member teams (collectively, the "NBA Teams"). Judge Duffy held that: (i) the antitrust laws have no application to the collective bargaining negotiations between appellants and the NBA Teams; and (ii) even if the antitrust laws apply, the "College Draft," "Right of First Refusal," and "Revenue Sharing/Salary Cap System" survive scrutiny under the Rule of Reason. We affirm on the first ground.

BACKGROUND

The NBA is comprised of 27 member teams, each of which is an appellee on this appeal. Appellants are a class of present and future players on NBA member teams, and the National Basketball Players Association, the exclusive bargaining representative of all players presently on the roster of NBA Teams (collectively the "Players").

For nearly 30 years, the NBA Teams have bargained as a multiemployer bargaining unit with the Players Association. Since October 1967, the NBA and the Players Association have entered into ten successive collective bargaining agreements ("CBAs"). The most recent CBA went into effect on November 1, 1988 (the "1988 CBA"), and expired on June 23, 1994, the day following the last playoff game of the 1993-94 NBA season. During negotiations over a new CBA in April and May 1994, the Players demanded the elimination of three provisions contained in the 1988 CBA: the "College Draft," the "Right of First Refusal," and the "Revenue Sharing/Salary Cap System."

The College Draft is the process by which exclusive rights to negotiate with eligible college players are apportioned among the NBA Teams. In general, the College Draft allows teams with the worst records to select earlier than teams with better records. The NBA Teams select 54 players in the Draft. A player who is drafted by a particular team may negotiate only with that team. A player who is not drafted may negotiate with any NBA team.

The Right of First Refusal permits a team to match any offer made to one of its current players by another team and thus to retain the player's services. The Right of First Refusal applies only to Restricted Free Agents—players who have either completed fewer than two contracts or have fewer than four years of experience in the NBA.

The Revenue Sharing/Salary Cap System establishes an overall wage framework that provides that: (i) total player salaries and benefits paid by all NBA Teams will be no less than a specified percentage of revenues; and (ii) the total salary paid to players by each team is subject to both a maximum and a required minimum. The Right of First Refusal and the present version of the College Draft have been incorporated in all the CBAs signed by the parties since 1976; the Revenue Sharing/Salary Cap provision has been included in every CBA since 1983.

On May 4, 1994, the Players refused to negotiate further with the NBA Teams until the 1988 CBA formally expired. On

June 17, 1994, the NBA Teams began the instant action in the Southern District of New York, seeking a declaratory judgment against the individual appellants and a class of all present and future NBA players. The NBA Teams sought two principal declarations: (i) that the continued imposition of the disputed provisions of the CBA would not violate the antitrust laws because that imposition is "governed solely by the labor laws and is exempt from antitrust liability under the nonstatutory exemption to the antitrust laws"; and (ii) that the disputed provisions are lawful even if the antitrust laws apply. On June 27, 1994, the Players counterclaimed, asserting that continued imposition by the NBA Teams of the College Draft, Right of First Refusal, and Revenue Sharing/Salary Cap System violated the Sherman Act because they were no longer embodied in an unexpired CBA. They sought a temporary restraining order and preliminary injunction barring the NBA Teams from entering into contracts with players until the case could be decided on the merits. On June 28, 1994, Judge John F. Keenan issued the requested TRO and set a July 8 date for a preliminary injunction hearing.

On July 8, Judge Duffy, to whom the case was assigned, consolidated the preliminary injunction hearing with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). The trial was conducted on July 12, 1994. The Players called nine witnesses—three players, three player agents, the Executive Director of the Players' Association, and two economists. Because Judge Duffy allotted only one day for the trial, the Players proffered their direct testimony largely through affidavits, followed by cross-examination. The NBA Teams called NBA Commissioner David J. Stern as a live witness and introduced the affidavit of Deputy Commissioner Russell T. Granik.

On July 18, Judge Duffy granted the NBA's request for declaratory relief and dismissed the Players' counterclaim. Relying on *Powell v. National Football League*, 930 F.2d 1293, 1304 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040, 111 S. Ct. 711, 112 L.Ed.2d 700 (1991), Judge Duffy concluded that the nonstatutory labor exemption from the antitrust laws

applied, and that "[a]ntitrust immunity exists as long as a collective bargaining relationship exists." Accordingly, he held that the NBA was entitled to a declaration that the continued imposition of the College Draft, Right of First Refusal, and Revenue Sharing/Salary Cap provisions does not violate the antitrust laws so long as there is a collective bargaining relationship between the NBA and the Players' Association.

Judge Duffy further held that, even if the NBA Teams have no antitrust immunity, the Players had nevertheless failed to show that the provisions in question are "unreasonably anti-competitive." In so concluding, he relied upon the benefits of competitive athletic balance that he found are promoted by those provisions. He thus held that the disputed provisions do not violate the antitrust laws even if the nonstatutory labor exemption does not apply.

The Players appealed.

DISCUSSION

A. *The Players' Antitrust Claim and the NBA Teams' Defense*

The gravamen of the Players' claim is not that the College Draft, Right of First Refusal, or Revenue Sharing/Salary Cap System result in a restraint on competition unique to those provisions (although they discuss the restrictiveness of those particular provisions with regard to the Rule of Reason issue). Rather, the vice on which their claim relies is that the NBA Teams have agreed jointly to impose these provisions as terms and conditions of employment pending agreement on a new CBA. Their "main point" is that "these are naked restraints between competitors; they prevent competition; they fix prices; they suppress salaries." Appellants' Brief at 11. At oral argument, counsel for the Players stated that the "underlying offense" is that "horizontal competitors for labor have entered into what is essentially a price-fixing agreement." Although the Players concede that employers may act jointly with regard to terms of employment where a particular union agrees to those terms, *see Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987), they dispute the legality of any joint conduct going

beyond proposals to that union. Logically, the Players' position is that multiemployer groups should be barred from insisting upon, or using economic force to obtain, the desired terms of employment. Therefore, by acting collectively to impose terms of employment after expiration of the CBA, the NBA Teams are, in the Players' view, acting as a cartel and committing a *per se* violation of the Sherman Act. *See* Appellants' Brief at 39 (characterizing the disputed provisions as "naked agreements among competitors designed . . . to fix . . . labor costs"). They might add, moreover, that the cartel's decision is enforced by a joint boycott—that is, a failure by a Team to abide by the cartel's rules would result in sanctions imposed by the NBA, including perhaps expulsion from the league—another *per se* violation.

The claim is fashioned to rely upon classic principles of antitrust law. Absent justification under the Rule of Reason or some defense, employers who compete for labor may not agree among themselves to purchase that labor only on certain specified terms and conditions, *see Anderson v. Shipowners' Ass'n*, 272 U.S. 359, 47 S.Ct. 125, 71 L.Ed. 298 (1926), and such a cartel may not enforce its will through an agreement to boycott those who do not abide by its rules, *see Eastern States Retail Lumber Dealers' Ass'n. v. United States*, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914). Such conduct would be *per se* illegal.

The Players' claim does limit the application of normal antitrust principles in recognition that some accommodation must be made to labor law. For example, if the NBA Teams are a naked price (wage)-fixing cartel as the *per se* claim asserts, there would be no reason to allow them even to discuss prices (wages). *See Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 362, 102 S.Ct. 2466, 2482, 73 L.Ed.2d 48 (1982) ("a *per se* price-fixing agreement meriting condemnation . . . is a naked restraint of trade with no purpose except stifling of competition"). At oral argument, appellants took the position that the NBA Teams may consult over and "suggest," but not "impose," terms and conditions of employment pending a new CBA. In their view, consultation and proposal are protected by

the so-called nonstatutory antitrust exemption, whereas the imposition of terms, or, logically, insistence upon them, is subject to antitrust sanctions. However, because the NBA Teams are simply maintaining the *status quo* under the expired 1988 CBA, the question arises as to what terms and conditions of employment should govern the parties' relationship until a new CBA is reached if maintenance of the *status quo* is an antitrust violation. For lack of any discernible alternative, we conclude that the Players' answer must be that the Players' Association will impose those terms and conditions.

The NBA's defense is a two-fold, alternative response: (i) the Players' antitrust claim is entirely trumped by the legislative scheme governing labor relations and collective bargaining, *see Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040, 111 S.Ct. 711, 112 L.Ed.2d 700 (1991), in particular by the protection afforded multiemployer bargaining by that scheme, *see NLRB v. Truck Drivers Local Union No. 449* ("*Buffalo Linen*"), 353 U.S. 87, 77 S.Ct. 643, 1 L.Ed.2d 676 (1957); and (ii) even if the antitrust laws do apply, the College Draft, Right of First Refusal, and Revenue Sharing/Salary Cap provisions survive scrutiny under the Rule of Reason because the efficiencies these provisions afford in the way of competitive athletic balance among NBA teams outweigh their effect on competition for the services of the Players, *see NCAA v. Board of Regents*, 468 U.S. 85, 117, 119-20, 104 S.Ct. 2948, 2968, 2969-70, 82 L.Ed.2d 70 (1984).

We conclude as follows. Relevant legal authority, including importantly the lack thereof, strongly suggests that the antitrust laws do not prohibit employers from acting jointly in bargaining with a common union. Multiemployer bargaining was commonplace and essentially unchallenged—despite the existence of the antitrust laws—long before the passage of the federal labor laws. The labor laws, moreover, embody a conscious congressional decision to permit multiemployer organizations to bargain hard and use economic force to resolve disputes with unions over terms and conditions of employment. Because the Players' position appears to be inconsistent with

the approach taken under the antitrust laws regardless of labor law and, in any event, collides head-on with the labor laws' endorsement of multiemployer collective bargaining, we conclude that the Players' claim must fail. We need not, therefore, address the various arguments pro and con regarding the Rule of Reason.

B. *The Nature and Purposes of Multiemployer Bargaining*

Multiemployer bargaining is a very common practice throughout the United States and literally involves millions of employees and thousands of employers. *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410 n.4, 102 S.Ct. 720, 724 n.4, 70 L.Ed.2d 656 (1982). The practice is probably as old as unionism itself. *See* Clarence E. Bennett, *Employers' Associations in the United States: A Study of Typical Associations 21* (1921) (employer associations can be traced to middle-ages). It is a process by which employers band together to act as a single entity in bargaining with a common union or unions. Typically, the employers are competitors in the products and services they provide to buyers. Quite often, they are also horizontal competitors for labor. For example, local printing firms that compete with each other to obtain printing jobs and to obtain labor may bargain jointly with a union of printers.

One important purpose of such bargaining is to strengthen the employers' hand by preventing a union from whipsawing employers by shutting them down one-by-one, a tactic that forces each employer to give in to the union's most extreme demand. *See Bonanno Linen*, 454 U.S. at 409-10 & n.3, 102 S.Ct. at 723-24 & n.3. Multiemployer bargaining thus allows employers to form a common front as to terms and conditions to be offered to a union and to confront the union with a simultaneous shutdown of all the employers should negotiations fail and the parties resort to economic force. Such bargaining also eliminates competitive disadvantages resulting from differing CBA terms for different employers. *Id.* at 409 n.3, 102 S.Ct. at 723 n.3. Finally, it makes available group benefit programs that may be unavailable to individual employers and

reduces negotiating costs by eliminating multiple negotiations. *Id.*

In the sports industry, multiemployer bargaining exists not only for the reasons stated above but also because some terms and conditions of employment must be the same for all teams in a sports league. Unlike the industrial context in which many work rules can differ from employer to employer—even though a roughly common bottom line is desirable—sports leagues need many common rules. Number of games, length of season, playoff structures, and roster size and composition, for example, are just a few of the many kinds of league rules that are typically bargained over by sports leagues and unions of players.

Appellants' claim is that employers may not agree upon common terms and conditions of employment to be negotiated in a new CBA, bargain hard over those terms, ultimately insist upon them, and even obtain them by resorting to economic force. Appellants thus claim that the most routine practices of multiemployer bargaining, if not its very *raison d'etre*, are *per se* unlawful. It is the essence of multiemployer bargaining that employers jointly establish and maintain a unified front in dealing with a common union. That goal requires that employers be allowed to meet and agree upon the terms and conditions of employment to be pursued as a unit and to act as though they were a single employer. The Players' claim is thus based on the proposition that the major purposes of, and the means employed by, multiemployer organizations are illegal.

C. *The Antitrust Laws and Multiemployer Bargaining*

The existence of employer organizations that bargained with unions of employees predated the passage of the Sherman Act in 1890. *See* Bennett, *supra*, at 21-22. Indeed, at that time these organizations existed at the national as well as local level. *Id.* Nevertheless, we find during the 104 succeeding years not a single instance, prior to this very case, of a union or an individual employee asserting the stark claim that the routine practices of multiemployer bargaining violate the antitrust laws. It is true that recent challenges in the professional sports

industry have at times involved facts very similar to those in the instant matter, *see Powell*, 930 F.2d 1293; *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987), but the multiemployer bargaining issue appears to have been raised obliquely, if at all.

To the extent Congress has focused on the legality of multiemployer collective bargaining, it has always indicated its approval, or at least an assumption of legality. In 1920, Congress sought in the Clayton Act to prevent federal courts from interfering in labor disputes. Although Congress was largely concerned with the effect of such interference on unions, the statute was phrased in an evenhanded fashion to protect employer conduct in labor disputes as well as that of unions. Section 20 thus exempted from federal prohibition "persons . . . terminating any relation of employment . . . or withholding . . . moneys or things of value," language that would permit multiemployer lockouts. 29 U.S.C. § 52. In 1932, Congress passed the Norris-LaGuardia Act, which barred federal courts from issuing injunctions against firms seeking to join, or remain members of, employer organizations, 29 U.S.C. § 104(b), and used language similar to that of the Clayton Act quoted *supra*, 29 U.S.C. § 104(c). The definition of persons involved in a labor dispute also recognizes the existence of employer organizations. *See* 29 U.S.C. § 113(b). *See also California State Council of Carpenters v. Associated Gen. Contractors*, 648 F.2d 527, 535 (9th Cir. 1981) ("[E]ven if the antitrust laws had been interpreted so as to bring multiemployer bargaining units within the scope of the Sherman Act, the statutory exemption found in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, when read together with section 20 of the Clayton Act, 29 U.S.C. § 52, clearly exempts '[b]ecoming or remaining a member . . . of any employer organization' from the antitrust laws. 29 U.S.C. § 104(b)." (footnote omitted)). In 1947, Congress refused to limit multiemployer bargaining because it concluded that such bargaining "was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353

U.S. at 95, 77 S. Ct. at 647 (discussing congressional debate over the Taft-Hartley amendments of 1947).

The lack of any antitrust challenge to, or congressional action restricting, multiemployer bargaining, for a century during which it prominently existed, grew, and flourished, strongly suggests some kind of general understanding about the legality of multiemployer bargaining that is fundamentally inconsistent with appellants' claim.

The lack of any legal or congressional challenge was certainly not the result of any obscurity regarding the antitrust principles relied upon by the Players. In 1897, the Supreme Court held that an agreement upon prices among competitors violated the Sherman Act. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 335, 17 S. Ct. 540, 556-57, 41 L.Ed. 1007 (1897). In 1914, it held joint boycotts illegal. *Eastern States*, 234 U.S. 600, 34 S. Ct. 951. In 1926, it held that employers who were horizontal competitors for labor were prohibited from agreeing upon terms and conditions of employment. *Anderson*, 272 U.S. 359, 47 S. Ct. 125. The principles upon which the Players rely, therefore, were well-known and settled early on. Nor was the lack of any such challenge the result of the obscurity of the antitrust laws. Throughout the period from the passage of the Sherman Act until 1941, *see United States v. Hutcheson*, 312 U.S. 219, 61 S. Ct. 463, 85 L.Ed. 788 (1941) (exempting union activity from challenges under the Sherman Act), unions and employers were frequently locked in nationally controversial antitrust litigation. *See* Robert A. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 621-24 (1976). (It might be suggested that unions failed to mount the precise claim at issue here because multiemployer bargaining is voluntary under the labor laws. *Bonanno Linen*, 454 U.S. at 412, 102 S. Ct. at 725; *Council of Carpenters*, 648 F.2d at 543-54. However, that fails to explain the lack of any such challenge by a union prior to passage of the Wagner Act in 1935 or by an individual employee thereafter.)

Indeed, the *only* case that directly addresses the issue of the legality of multiemployer bargaining under the antitrust laws appears to be *California State Council of Carpenters v. Associated General Contractors*, 648 F.2d at 543-54. The decision in question was on a petition for rehearing by the defendant employers who claimed that a prior opinion in the matter suggested that multiemployer bargaining violated the antitrust laws. It is noteworthy that no such claim had been asserted by the plaintiff union. The opinion on rehearing disclaimed any such intent and directly held that "although multiemployer bargaining units may affect or restrain competition in the area of wages and working conditions, such restraints will not be considered to violate the antitrust laws." 648 F.2d at 544.

We believe that the history recounted here strongly suggests that Congress never intended that the antitrust laws prohibit multiemployer bargaining with a common union. Congress seemed to assume, and then to act on that assumption in 1947, *see Buffalo Linen*, 353 U.S. at 95-96, 77 S. Ct. at 647-48, that multiemployer bargaining was both efficient and a necessary counterweight to union power. Such a belief arguably fits within Rule of Reason analysis that permits "ancillary restraints" necessary to a legitimate transaction. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *modified*, 175 U.S. 211, 20 S. Ct. 96, 44 L.Ed. 136 (1899). Whether as a court we would reach that result if writing on a clean slate is not the issue, however, because whatever doubt might have existed as to Congress' intent was entirely eliminated by the passage of federal labor laws.

D. *Labor Law and Multiemployer Bargaining*

In *Wood v. National Basketball Association*, 809 F.2d 954 (2d Cir. 1987), we noted that "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy." *Id.* at 959. The present case appears to have proven us wrong because just such a contention is being seriously made.

As noted, multiemployer bargaining has been a conspicuous feature of collective bargaining since the very formation of unions. To hold at this late date that it—or the essence of practice under it—is illegal under the antitrust laws would cause a massive reshaping of the institution of collective bargaining.

Under the National Labor Relations Act, employers and unions must bargain in good faith over mandatory subjects of bargaining. 29 U.S.C. § 158(d). Our decision in *Wood* held that the College Draft, Right of First Refusal, and Revenue Sharing/Salary Cap System are mandatory subjects of bargaining. *Wood*, 809 F.2d at 962. It is settled law that employers may formulate proposals to unions and insist upon the proposals so long as they bargain in good faith. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210, 85 S. Ct. 398, 402, 13 L. Ed.2d 233 (1964). It is also settled law that employers may implement terms and conditions of employment after good-faith bargaining to an impasse and also resort to economic force, including lock-outs, in support of their demands. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 675, 101 S. Ct. 2573, 2579, 69 L. Ed.2d 318 (1981) ("[B]oth employer and union may bargain to impasse over [terms and conditions of employment] and use the economic weapons at their disposal to attempt to secure their respective aims."); *see also American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 85 S. Ct. 955, 13 L. Ed.2d 855 (1965) (upholding employer's right to lock out employees). In appellants' view, however, they need not really bargain over mandatory subjects of bargaining because the employers' conduct described above, when engaged in by a multiemployer organization, constitutes illegal price-fixing.

Turning to the precise facts of the present case, the claim that the NBA Teams may not continue to impose the challenged provisions places the Teams in an impossible position. Those provisions were, of course, part of the 1988 CBA, and, under the Teams' obligation to bargain in good faith, they were obligated to maintain the *status quo* until an impasse was reached. *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed.2d 230 (1962). However, appellants claim that imposition of those

provisions violated the antitrust laws as soon as the CBA expired, a position that views as illegal, conduct required by the NLRA. Even after impasse, moreover, if employers may impose new terms and conditions of employment, they are surely free to maintain the *status quo*.

The only basis for the claim asserted by appellants is that multiemployer bargaining is illegal. For us, therefore, the decisive fact is that the Supreme Court has upheld multiemployer bargaining on the ground that Congress expressly considered its propriety and resolved that it should be allowed. *Buffalo Linen*, 353 U.S. at 95-96, 77 S. Ct. at 647-48. *Buffalo Linen* involved a multiemployer association of eight employers who were horizontal competitors in hiring labor and in providing linen services. In the course of negotiating a new agreement with the association, the union struck one of the employers. In response, the other seven employers locked out their employees. The Labor Board held that the lockout was justified as a reasonable measure to preserve multiemployer bargaining against the threat of being forced into submission one-by-one. The Court of Appeals overturned the Board, holding that preservation of the integrity of multiemployer bargaining did not justify a lockout. The Supreme Court unanimously reversed, holding that Congress expressly intended that multiemployer bargaining be allowed and that the Board had discretion to hold as it did.

In speaking for the unanimous Court, Justice Brennan wrote:

> Multiemployer bargaining long antedated the Wagner Act, both in industries like the garment industry, characterized by numerous employers of small work forces, and in industries like longshoring and building construction, where workers change employers from day to day or week to week. This basis of bargaining has had its greatest expansion since enactment of the Wagner Act because employers have sought through group bargaining to match increased union strength. Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer

associations. At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.

The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining. The inaction of Congress with respect to multi-employer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation. Rather, the compelling conclusion is that Congress intended "that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future." [*Truck Drivers Local Union No. 449 v. NLRB*, 231 F.2d 110, 117-18 (2d Cir. 1956).]

Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to

> the National Labor Relations Board, subject to limited judicial review.

353 U.S. at 94-96, 77 S. Ct. at 646-48 (footnotes omitted).

Buffalo Linen simply cannot be reconciled with appellants' antitrust claim. The facts in that case plainly involved conduct that, if antitrust principles apply, were price-fixing and a joint boycott, *per se* violations of the Sherman Act. However, the decision not only permitted the conduct but also stated that Congress had expressly considered multiemployer bargaining and had resolved to allow it subject only to the limitations of labor law as interpreted by the Labor Board. At oral argument, the Players sought to distinguish *Buffalo Linen* on the ground that it deals solely with issues relating to the use of economic force. That reading of the decision is simply unsupportable. Indeed, the suggested distinction between employers proposing terms and conditions of employment and employers' resorting to economic force to back up the proposals is at war with appellants' antitrust claim. A cartel that proposes common terms hardly ceases to be a cartel when it resorts to economic force to enforce those terms. If anything, the resort to economic force enhances rather than diminishes the effect on competition.

Finally, the Players correctly note that multiemployer bargaining is generally a voluntary matter and that employers or unions are free to withdraw from it. *See Bonanno Linen*, 454 U.S. at 412, 102 S. Ct. at 725. Even so, the consequences of this voluntariness for the parties before us is left to proceedings under the NLRA before the Labor Board. This is particularly the case because the Board and one court of appeals have held that sports leagues are an exception to the principle of voluntariness. *See North American Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir.) (requiring teams in a soccer league to bargain as a "joint employer"), *cert. denied*, 449 U.S. 899, 101 S. Ct. 267, 66 L. Ed.2d 128 (1980).

We thus agree with the decision in *Powell*, 930 F.2d 1293, in which the Eighth Circuit held that the nonstatutory labor exemption precluded an antitrust challenge to various terms and conditions of employment implemented after impasse by

National Football League teams. The Court noted the soup-to-nuts array of rules and remedies afforded under the labor laws and concluded that application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it.

We agree. The claim before us, if adopted, would prevent employers in all industries from jointly bargaining hard with a common union. Although the Players' claim as presently formulated would allow employers jointly to make proposals, they could not maintain the *status quo* after expiration of the agreement and before bargaining to an impasse, nor could they implement new terms after impasse without fear of antitrust sanctions. The claim, of course, cannot be limited to sports leagues because it relies upon general antitrust principles. Under the interpretation of these principles urged by appellants, if, after expiration of a CBA, a group of printers were to agree to seek to limit wage increases to 5% and the union demanded 10%, the employers could shield themselves from antitrust liability only by implementing the 10% raise. The agreement among the printers is, after all, a "naked restraint[ ] between competitors; [it] prevent[s] competition; [it] fix[es] prices; [it] suppress[es] salaries." Appellants' Brief at 11. This is not collective bargaining as intended by Congress. Indeed, it is not bargaining at all.

CONCLUSION

We therefore hold that the antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a CBA, or from using economic force to obtain agreement to those proposals. What limits on such conduct that exist are found in the labor laws. We add only that this in our view is not necessarily a case in which two wholly inconsistent statutory schemes can be reconciled only by a judicial holding that one trumps the other. As our discussion of the antitrust laws indicated, there appears to have been a longstanding if unspoken assumption that multiemployer collective bargaining was not

subject to the antitrust laws for largely the reasons later stated in *Buffalo Linen* and *Bonanno Linen*. We hold only that what doubts may have existed about that assumption were erased by the passage of federal labor laws.

Affirmed.

ISSUED AS MANDATE
FILED: January 24, 1995
George Lange III, Clerk
United States Court of Appeals
Second Circuit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 94 Civ. 4488 (KTD)

National Basketball Association, Atlanta Hawks, L.P., Capital Bullets Basketball Club, Inc., Boston Celtics Limited Partnership, Charlotte NBA Limited Partnership, Chicago Professional Sports Limited Partnership, Dallas Basketball Limited, the Denver Nuggets Limited Partnership, Detroit Pistons Basketball Company, Golden State Warriors, Rocket Ball, Ltd., Jazz Basketball Investors, Inc., LAC Basketball Club, Inc., The Los Angeles Lakers, Inc., Madison Square Garden Corporation, Meadowlands Basketball Associates, the Miami Heat Limited Partnership, Milwaukee Bucks, Inc., Minnesota Professional Basketball Limited Partnership, Gund Business Enterprises, Inc., Orlando Magic, Ltd., Pacers Basketball Corporation, the Philadelphia 76ers Basketball Club, Inc., Phoenix Suns Limited Partnership, Sacramento Kings Limited Partnership, L.P., San Antonio Spurs, Ltd., Ackerly Communications, Inc., and Trail Blazers, Inc., *Plaintiffs*,

v.

Charles L. Williams, Charles D. Smith, Daniel R. Manning, Rolando A. Blackman, Mark E. Eaton, Lafayette Lever, Herbert L. Williams, James A. Jackson, Dikembe Mutombo, Glenn A. Rivers, David M. Robinson, Reggie Williams, Eric Anderson, Marty Conlon, Christian Laettner, Adrian Autry, Eric Mobley, Trevor Ruffin and Shawnelle Scott, on behalf of themselves and all persons similarly situated, *Defendants*.

Dominique Wilkins, Horace Grant, Brian Shaw, Dale Davis, Terrell Brandon, Donyell Marshall, Charles L. Williams, Charles D. Smith, Daniel R. Manning, Rolando A. Blackman, Mark E. Eaton, Lafayette Lever, Herbert L. Williams, James A. Jackson, Dikembe Mutombo, Glenn A. Rivers, David M. Robinson, Reggie Williams, Eric Anderson, Marty Conlon,

Christian Laettner, Adrian Autry, Shawnelle Scott, on behalf of themselves and all persons similarly situated, and the National Basketball Players Association, *Counterclaim-Plaintiffs*,

v.

National Basketball Association, Atlanta Hawks, L.P., Capital Bullets Basketball Club, Inc., Boston Celtics Limited Partnership, Charlotte NBA Limited Partnership, Chicago Professional Sports Limited Partnership, Dallas Basketball Limited, The Denver Nuggets Limited Partnership, Detroit Pistons Basketball Company, Golden State Warriors, Rocket Ball, Ltd., Jazz Basketball Investors, Inc., LAC Basketball Club, Inc., The Los Angeles Lakers, Inc., Madison Square Garden Corporation, Meadowlands Basketball Associates, The Miami Heat Limited Partnership, Milwaukee Bucks, Inc., Minnesota Professional Basketball Limited Partnership, Gund Business Enterprises, Inc., Orlando Magic, Ltd., Pacers Basketball Corporation, the Philadelphia 76ers Basketball Club, Inc., Phoenix Suns Limited Partnership, Sacramento Kings Limited Partnership, L.P., San Antonio Spurs, Ltd., Ackerly Communications, Inc. and Trail Blazers, Inc., *Counterclaim-Defendants*.

July 18, 1994.

OPINION

KEVIN THOMAS DUFFY, District Judge.

The National Basketball Association (the "NBA") and the 27 teams (the "NBA Teams" or "Teams") that compete in the NBA commenced a declaratory action on June 17, 1994 against a class of NBA players as well as prospective NBA players, pursuant to 28 U.S.C. § 2201. In particular, the NBA and the Teams seek a declaration that continued implementation of: (1) the college draft; (2) the right of first refusal; and (3) the salary cap does not violate federal antitrust laws. (Am. Compl. ¶ 105). Alternatively, the NBA contends that these measures are

not unreasonable restraints of trade and therefore do not violate the antitrust laws. (Am. Compl. ¶ 113).

The same class of players who are defendants in the declaratory judgment claim, along with the National Basketball Players Association (the "NBPA") (collectively the "Players"), brought counterclaims alleging, in effect, that continuation of these policies are unreasonable restraints of trade not exempt from antitrust law and thereby violate the Sherman Act. (Counterclaim ¶¶ 43, 47 & 51). Shortly after initiating the counterclaims, the Players moved for a temporary restraining order and a preliminary injunction: (1) to enjoin the Teams from entering into player contracts with current or prospective professional basketball players, and (2) schedule an expedited trial on the merits. On June 28, 1994, the Honorable John F. Keenan granted the temporary restraining order and set a hearing date for the preliminary injunction motion. On July 1, 1994, I was assigned this case, and a hearing was conducted on July 8, 1994. At the hearing, I informed the parties that the preliminary injunction hearing would be consolidated with the trial on the merits, pursuant Rule 65(a)(2) of the Federal Rules of Civil Procedure. A consolidated factual hearing was conducted on July 12, 1994.[1]

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[1] Counsel for the NBA objected to the shortness of the trial as well as its expedited nature. The Federal Rules of Civil Procedure authorize me to order a speedy hearing for a declaratory judgment action. Fed. R. Civ. P. 57. Thus, they cannot be heard to complain about the expedited nature of a case they initiated. In addition, several other reasons exist for speeding this case along. First, the Teams and the Players use this period to sign contracts and prepare for the upcoming season. It would be unfair to allow this litigation to create a legal cloud over contract negotiations. (*See* Trial Testimony of David J. Stern, July 12, 1994, at 155-60 (hereinafter "Tr.")). Moreover, the raw facts that underlie this action are not in dispute. The dispute centers on the applicable legal standard. Therefore, the parties simply needed an opportunity to put the facts on the record. The parties had ample time to do so before, during, and after trial. Finally, I received the parties' papers on July 5, 1994. In such a complicated case that must be resolved quickly, only a judge unwilling to have an open mind would attempt to rule prior to a detailed factual hearing. Therefore, I ordered a trial on the merits for July 11, 1994.

BACKGROUND

This case is the fourth lawsuit initiated by either of the parties as a result of disputes that have arisen during collective bargaining negotiations. Indeed, I am convinced that this is a case where neither party cares about this litigation or the result thereof. Both are simply using the court as a bargaining chip in the collective bargaining process. Each is truly guilty of this practice.[2] A recitation of the history of these lawsuits demonstrates this and puts this litigation in its proper context, *i.e.*, a labor dispute that does not belong in litigation.

In 1970, the Players commenced a class action suit against the NBA in the federal district court for the Southern District of New York, challenging certain NBA imposed player restrictions on antitrust grounds. The NBA moved for summary judgment, arguing that the practices were shielded from antitrust laws by a labor exemption. The district court denied the NBA's motion on the ground that the exemption only shields unions and not employers. *Robert v. National Basketball Ass'n*, 389 F. Supp. 867, 884-89 (S.D.N.Y. 1975).

In 1976, the parties in *Robertson* entered, and the district court approved, a settlement agreement. This agreement effected a number of changes in the operation of the NBA, including modification of the college draft and institution of the right of first refusal. (Am. Compl. ¶¶ 63-64). The settlement agreement provided that it would expire at the end of the 1986-1987 NBA season. In addition, it expressly provided that the Players had not waived their right to challenge in court any unilateral imposition of any rule, policy, practice or agreement by the NBA. When the *Robertson* settlement agreement was adopted in 1976, the Players and the NBA also entered into a multi-year collective bargaining agreement incorporating the substantive terms of the settlement agreement. The 1976

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[2] The initiation of the declaratory judgment action cannot be said to violate Rule 11 of the Federal Rules of Civil Procedure. It does, however, constitute sharp and shady practices of the type that most ethical lawyers shun.

Collective Bargaining Agreement expired on June 1, 1979, and on October 10, 1980, the parties again entered into a multi-year collective bargaining agreement that expressly incorporated the terms of the *Robertson* settlement agreement, including the college draft and the right of first refusal. (Granik Decl., July 6, 1994, ¶¶ 12-15).

The 1980 agreement expired on June 1, 1982. (1980 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 2, Art. XXVI). In 1983, the NBA sought for the first time to introduce the salary cap. The NBA contended that such a restriction was necessary because the majority of NBA teams were losing money, due in part, to rising player salaries and benefits. (*See* Grantham Trial Decl., July 11, 1994, ¶¶ 3, 13). The players responded by filing a lawsuit challenging the legality of the salary cap. *Lanier v. National Basketball Ass'n*, 82 Civ. 4935 (S.D.N.Y.). A special master appointed to hear disputes under the *Robertson* settlement agreement determined that the salary cap would violate the terms of the settlement agreement and, therefore, could not be imposed without a modification of that agreement. (Granik Decl., July 6, 1994, ¶¶ 17-19). The Players and the NBA entered into a Memorandum of Understanding that modified the expired 1980 Collective Bargaining Agreement to include a salary cap, and it continued in force through the end of the 1986-1987 season. (Granik Decl., July 6, 1994, Ex. 3).

On June 8, 1987, the NBA and the Players entered into a Moratorium Agreement to facilitate negotiations, whereby the challenged practices would remain in effect but no new contracts would be signed. The Moratorium Agreement expired on October 1, 1987. (Grantham Decl. 31 & Ex. A). The day the Moratorium Agreement expired, the Players commenced an action in the District of New Jersey, seeking a ruling that the college draft, the right of first refusal, and the salary cap violated the antitrust laws. *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 961 (D.N.J. 1987). The Players represented to the court that they would never agree to these restrictive practices. (Granik Decl., July 6, 1994, Ex. 4). After a ruling on the labor exemption issue, discussed more fully

below, the parties reached an agreement in principle, the final terms of which were memorialized in the 1988 Collective Bargaining Agreement. (Granik Decl., July 6, 1994, ¶¶ 29). The 1988 Collective Bargaining Agreement continued the college draft, the right of first refusal and the salary cap. (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Arts. IV, V, & VII).

The 1988 Collective Bargaining Agreement formally expired on June 23, 1994, the day following the last playoff game of the 1993-1994 NBA playing season. (Grantham Decl., June 26, 1994, ¶ 4). At a formal bargaining session, held in New York on April 7, 1994, the Players demanded that the three disputed employment practices be eliminated. (Grantham Decl., June 26, 1994, ¶¶ 39-40). In a position paper delivered to the NBA at that meeting, the Players expressly stated their view that the college draft, right of first refusal and the salary cap would "be subject to successful challenge under the antitrust laws." This position was reiterated at a second formal bargaining session, held on May 4, 1994. (Granik Decl., July 6, 1994, ¶ 33).

On June 15, 1994, in a letter addressed to the NBA, the Players, while asserting that further negotiations would be futile, said that the Players would attend another meeting, but only in late June or mid-July. In that letter, the NBPA again threatened that the NBA's continuation of the employment conditions at issue would be "subject to scrutiny under the antitrust laws and . . . are clearly in violation of those laws." (Granik Decl., July 6, 1994, ¶ 33). At the preliminary injunction hearing on July 8, 1994, I informed the parties of my belief that this litigation was simply being used as a bargaining chip in the collective bargaining negotiations, and I advised them that the best course of action would be to resolve the dispute through negotiations. (Transcript of Preliminary Injunction Hearing, July 8, 1994, at 8-9). Apparently, the parties did attempt to negotiate, but such efforts were unsuccessful. (Stern Testimony, Tr. at 153).

The Challenged Measures

The College Draft

The college draft is held annually shortly after the NBA season concludes. It is a mechanism in which each team is allotted two selections. A team may exercise its selections or trade them to another team. The order of selection is generally determined by the records of the 27 Teams for the season immediately preceding the draft, *i.e.*, the weaker teams select earlier. In the end, 54 prospective players are selected by the Teams. A player who is selected by a particular team may only negotiate with that team. Any team that negotiates with a player it did not select is severely penalized. Prospective players who are not drafted are free to negotiate with any NBA team. (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Art. IV).

The Right of First Refusal

Under the 1988 Collective Bargaining Agreement, the Teams maintain a right of first refusal over players who have played fewer than four seasons or who have not completed at least two contracts. When a player's contract expires, he is able to negotiate a new contract with any team. If a team has a right of first refusal over that player, however, it may match any offer another team makes. If there is a matching offer, the player may not sigh with the new team, and his services are retained by his current team. (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Art. V).

The Salary Cap

The salary cap is part of a complex player/owner revenue sharing arrangement in which the Players are guaranteed a percentage of the defined gross revenue of the team. This arrangement also operates as a ceiling on the total amount a team may spend on salaries for its players. As part of this arrangement, each team is also required to pay a minimum amount of salaries to its players (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Art. VII, Pt. A, Sec. 1(e)-(f)). The salary cap may be exceeded by a team that

wishes to pay a veteran player it currently employs. A team may, however, not exceed the salary cap to acquire a new player. (1988 Collective Bargaining Agreement, Granik Decl., July 6, 1994, Ex. 5, Art. VII, Pt. F).

DISCUSSION

(1) *The Nonstatutory Labor Exemption*

As a threshold matter, the NBA argues that antitrust law does not apply in this case because a collective bargaining relationship currently exists between the players and the NBA.[3] In particular, the NBA contends that the nonstatutory labor exemption applies, and therefore, any antitrust claim the Players may seek must fail.

The parties do not dispute that prior to the formal expiration of the Collective Bargaining Agreement on June 23, 1994, the NBA as well as the Players were immune from antitrust claims. *Wood v. National Basketball Ass'n*, 809 F.2d 954, 963 (2d Cir. 1987). In *Wood*, the Second Circuit specifically held that an antitrust challenge to the NBA's salary cap and college draft, *inter alia*, failed because antitrust laws may not "be used to subvert fundamental principles of our federal labor policy . . . ." *Id.* at 959. Thus, the law in this Circuit appears to be where a collective bargaining relationship exists, federal labor law applies to the disputes that arise between the bargaining parties. *Id.*

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[3] In addition to the objection outlined in the text, the NBA objected to the July 11, 1994 trial, contending that jurisdiction did not exist because of the Norris-LaGuardia Act's prohibition against injunctions involving labor disputes. *See* 29 U.S.C. § 101 et seq. Putting aside the merits of this dubious proposition, *but see Jackson v. National Football League*, 802 F. Supp. 226, 233 (D. Minn. 1992); *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606 (S.D.N.Y. 1970), the trial was necessary to elicit the facts of the claims set forth in the NBA's declaratory judgment action. It astounds me to no end that the NBA initiated this action, and then attempted to hinder the court from taking the necessary steps to decide this matter quickly. *See* Fed. R. Civ. P. 57. But, it may be merely the continuation of the practices referred to in footnote 2.

In a 1976 case involving player restraints in the National Football League (the "NFL"), the Court of Appeals for the Eighth Circuit analyzed the nonstatutory exemption as it applies to the market for player services and established a three pronged test for application of the exemption. *Mackey v. National Football League*, 543 F.2d 606, 615 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977). First, the restraint on trade must primarily affect only the parties to the collective bargaining relationship. Second, the agreement must concern mandatory subjects of collective bargaining. Finally, the agreement sought to be exempted is the product of bona fide arm-length bargaining. *Id. Mackey* reasoned that these tests are necessary to ensure that the exemption is applied only when it is clear that federal labor policies trump antitrust concerns. *Id.* Thus, *Mackey* also depends on a resolution of the conflicting labor and antitrust policy concerns.

The dispute here arises because the 1988 Collective Bargaining Agreement has formally expired. The issue is whether antitrust immunity that existed while the Collective Bargaining Agreement was in effect continues after its formal expiration, and if so, for what length of time. I can find only four non-binding decisions addressing this precise issue. Unfortunately, each decision fashioned a different standard to apply.

The first case to address this issue was *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987). As noted in the factual summary *supra*, in *Bridgeman*, the Players alleged that the continued effect of the college draft, the right of the first refusal and the salary cap after the formal expiration of the 1983 Collective Bargaining Agreement violated federal antitrust laws. *Id.* at 961. The NBA moved for summary judgment contending that the nonstatutory exemption immunized them from suit even though the 1983 Collective Bargaining Agreement had formally expired. Thus, the issue before the *Bridgeman* court was identical to the issue here.

The court refused to accept the Players' contention that antitrust immunity ends at the moment the collective bargaining

agreement formally expires. *Id.* at 965. The court noted that such a result would not be consistent with the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the "NLRA"). *Id.* Under the NLRA, the owners have an obligation, even after the collective bargaining agreement expires, to bargain fully and in good faith before altering a term of condition of employment that is a mandatory subject of collective bargaining. One can easily imagine the howls to be heard from the Players if the Teams unilaterally terminated medical coverage for them and their families at the formal expiration of the Collective Bargaining Agreement. It is for the good of our entire society that such is not the law. *See* 29 U.S.C. § 158(a)(5). The *Bridgeman* court determined that the practical effect of this duty on employers is that the "terms and conditions of employment that are the subject of mandatory bargaining survive expiration of collective bargaining agreement." *Bridgeman*, 675 F. Supp. at 965.

The *Bridgeman* court also found the NBA's contention that antitrust immunity lasts indefinitely equally unavailing. *Id.* at 966. In particular, the court reasoned that such a rule would discourage unions from entering into agreements, for fear of forever binding themselves with restraints that they could not subsequently attack in the courtroom. *Id.* After considering the elements of the *Mackey* test, the issue turned on whether the disputed terms will likely become part of a subsequent collective bargaining agreement. Thus, the test that *Bridgeman* established was that antitrust immunity survives only as long as the employer continues to impose the restrictions unchanged, and reasonably believes that the challenged practice or a close variant of it will be incorporated in the next collective bargaining agreement. *Id.* at 967.

In *Powell v. National Football League*, 678 F. Supp. 777 (D. Minn. 1988), Judge Doty of the District Court of Minnesota addressed whether the NFL could continue to restrict player movement after the formal expiration of a collective bargaining agreement. Judge Doty agreed with *Bridgeman* to the extent that immunity does not cease with the formal expiration of the collective bargaining agreement. Nor does it continue

indefinitely. *Id.* at 786-88. Judge Doty, however, held that the *Bridgeman* standard did not give proper regard for federal labor policy because it could encourage unions to be uncompromising while bargaining. *Id.* at 787. Rather, Judge Doty adopted the so-called impasse standard to be the appropriate standard. *Id.* at 788. Impasse was then defined as the point at which "there appears no realistic possibility that continuing discussions concerning the provision at issue would be fruitful." *Powell*, 678 F. Supp. at 788. Thus, by "allowing a labor exemption to survive only until impasse, the law will not insulate a practice from antitrust liability, but will only delay enforcement of the substantive law until continued negotiations over the challenged provision become pointless." *Id.* at 789.

Powell was reversed by the Court of Appeals for the Eighth Circuit in *Powell v. National Football League*, 930 F.2d 1293, 1304 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040, 111 S.Ct. 711, 112 L.Ed.2d 700 (1991) ("*Powell II*"). Specifically, *Powell II* held that the nonstatutory labor exemption extends beyond a mere impasse in negotiations and for as long as the labor relationship continues. *Id.* at 1303-04. The Eighth Circuit reasoned that once a collective bargaining relationship is established, federal labor policies become pre-eminent. As such, labor laws provide the opposing parties with sufficient tools to settle a dispute. For instance, employees may strike, employers may lock players out, and both parties may petition the National Labor Relations Board to prohibit unfair labor practices. Therefore, to provide the union with the ability to sue for treble damages under antitrust law "would . . . improperly upset the careful balance established by Congress through the labor law." *Id.* at 1302.

The essence of *Powell II* is that once a collective bargaining arrangement is established, and a valid and bona fide collective bargaining agreement is formed, federal labor law and its policies control. In other words, the disputes that arise from collective bargaining arrangements are labor disputes, and

Congress has enacted laws that provide various remedies to these disputes. *Id.*, at 1302-03. As the Eighth Circuit stated:

> The labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise. *Id.* at 1303.

In sum, *Powell II* effectively held that antitrust immunity exists as long as a collective bargaining relationship exists and labor law remedies are available. *Id.* at 1303-04.[4] In *Brown v. Pro Football, Inc.*, 782 F.Supp. 125 (D.D.C. 1991), the District Court for the District of Columbia set forth yet another approach to this issue. There, the court held that the continuing implementation of a collective bargaining agreement's salary provisions by the NFL after the agreement had expired was not shielded by the nonstatutory labor exemption. Instead, the exemption ended with expiration of the agreement. *Id.* at 130. The court reasoned that the purpose of the exemption was to foster a non-coercive environment conducive to the serious negotiation of a new agreement. If an employer was satisfied with the terms of the previous agreement, the extension of the exemption beyond contracted expiration date would discourage serious negotiation on its part. *Id.* at 131. In addition, the court reasoned that the extension of the exemption would deprive labor of an important bargaining chip—the threat of treble damages under the antitrust laws. *Id.* at 133. As such, immunity

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[4] Senior Judge Heaney dissented in *Powell II* and Chief Judge Lay, along with Judge McMillian, dissented from a denial of a rehearing en banc. These dissents argue that *Powell II* will discourage collective bargaining, fails to consider that in order for the exemption to apply union consent is necessary, and encourages union decertification. *Powell II*, 930 F.2d at 1304-10 (dissenting opinions). Both dissents favor application of the impasse standard enunciated by the district court. *Id.*

from antitrust law does not extend past the formal expiration of the collective bargaining agreement. *Id.* at 131.[5]

This review of the case law establishes that, if nothing else, opinions vary a great deal on this issue. *See, e.g.*, Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 Colum.L.Rev. 1045, 1071 (1994) (favoring a standard based on union consent); Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. 339, 400 (favoring ending the exemption at the formal expiration of the collective bargaining agreement). Obviously, this issue stems from the underlying conflict between antitrust and labor law policies. The issue, at its most basic level, is what role, if any, does antitrust policy play when a valid collective bargaining relationship exists. To find an answer to this question, I believe it is necessary to review the origin of the nonstatutory exemption.

The nonstatutory exemption was created by the Supreme Court to reconcile the conflicting policies between antitrust and labor laws.

> [W]e have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 806, 65 S.Ct. 1533, 1538, 89 L.Ed. 1939 (1945). *See also Connell Constr. Co. v. Plumber & Steamfitters Local Union No. 100*, 421 U.S. 616, 622, 95 S.Ct. 1830, 1835-36, 44 L.Ed.2d 418 (1975).

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[5] *Brown* alternatively held that the exemption does not extend past the point of impasse. *Brown*, 782 F.Supp. at 137.

The genesis of the labor exemption is *Allen Bradley*. In *Allen Bradley*, a group of New York City electrical equipment manufacturers and contractors—in furtherance of a broad industry-wide conspiracy to prevent electrical equipment manufacturers located outside of New York from selling their products within the City—entered into various collective bargaining agreements with a New York City union. In the agreements, the contractors agreed to purchase equipment only from local manufacturers, who had entered into closed-shop agreements with the union. In return, the manufacturers agreed to confine their New York City sales to contractors employing the union's members. Several equipment manufacturers located outside New York City brought an antitrust suit against the union. *Id.* at 799-800. The Court concluded that the union's participation in the employers' conspiracy in restraint of trade was not sufficient to immunize the parties' agreement from antitrust liability. *Id.* at 808.

The Supreme Court rendered a similar conclusion in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In *Pennington*, a group of large coal companies—in furtherance of a conspiracy with the United Mine Workers to drive smaller companies out of the coal industry—entered into a multi-employer collective bargaining agreement with the union that provided for increased wages and royalty payments into union pension and welfare fund. In return for those benefits, the union agreed that it would seek to impose the benefit provision of the multi-employer agreement on all industry employers without regard to their ability to pay. *Id.* at 660, 85 S. Ct. at 1588. Two smaller companies that had been pressured into paying the higher benefits brought an antitrust suit. The Court noted that a union may conclude a wage agreement that is shielded from antitrust laws, but it forfeits such immunity when it conspires with the employers "to eliminate competitors from the industry." *Id.* at 665-66, 85 S. Ct. at 1591.

In *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co.*, 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed.2d 640 (1965), a group of food

store owners entered into a multi-employer collective bargaining agreement with a union to limit the hours and days of operation of the stores' meat departments. When a competing food store refused the union's demand that it agree to this same limitation, the union struck the employer to obtain that limitation. The competing food store sued the union and the employers who were party to the multi-employer agreement for antitrust violations. *Id.* at 679-81, 85 S. Ct. at 1597-98. A three member plurality ruled that the union was shielded from antitrust liability because it obtained these provisions "through bona fide, arm's length bargaining in pursuit of [its] own labor union policies, and not at the behest of or in combination with nonlabor groups." *Id.* at 689-90, 85 S. Ct. at 1602.[6]

In the case at bar, the Players cite these cases for the proposition that union consent, while not always sufficient, is necessary for the labor exemption to apply. Indeed, *Mackey*'s third element, that the agreement be the product of bona fide arm's-length bargaining, is derived from the view that *Allen Bradley, Pennington*, and *Jewel Tea* stand for this proposition. *Mackey*, 543 F.2d at 611-14. *See also Powell*, 675 F. Supp. at 784-85; *Bridgeman*, 675 F. Supp. at 964-65 (adopting similar approach). Thus, the Players argue that absent union consent to the challenged measures through a valid collective bargaining agreement, the exemption no longer applies. Moreover, they contend that union consent ended on June 23, 1994, with the formal expiration of the 1988 Collective Bargaining Agreement.

The Players' reading of these Supreme Court cases is, however, fundamentally flawed. These decisions involve "injuries to *employers* who asserted that they were being excluded from competition in the product market." *Wood*, 809 F.2d at 963 (emphasis in original). The fact is that no Supreme

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[6] On behalf of a concurring panel of three, Justice Goldberg urged a holding that "a union acting as a union, in the interests of its members, and not acting to fix prices or allocate markets in aid of an employer conspiracy to accomplish these objects . . . is not subject to challenge under the antitrust laws." *Jewel Tea*, 381 U.S. at 710, 85 S. Ct. at 1614. (Goldberg, J., concurring).

Court decision has addressed whether a dispute between collective bargaining parties, duly authorized under the labor laws to represent either the employers or employees at the bargaining table, are immune from antitrust liability.

> From *Allen Bradley* to *Pennington*, the majority of the Court has insisted that one factor be present before the Sherman Act applies to arrangements arrived at through collective bargaining: one group of employers must conspire to use the union to hurt their competitors. The line the Court has consistently sought to draw, therefore, is the line between the product market and the labor market.

Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L. J. 1, 26 (1971). Thus, to apply the exemption as enunciated in *Allen Bradley, Pennington*, and *Jewel Tea* to disputes between employees and employers in a collective bargaining relationship does not fully account for the policies underlying federal labor law. Moreover, such a ruling would exaggerate federal antitrust concerns. *See Wood*, 809 F.2d at 959-63.

> Collective bargaining seeks to order labor markets through a system of countervailing power. Thus it is often referred to by economists as bilateral monopoly. If such a structure is to be protected by law, then logically the antitrust claims between employers and employees must be extinguished.

Jacobs & Winter, *Antitrust Principles*, 81 Yale L. J. at 22. Indeed, *Wood* noted this distinction between the product and labor markets and, by implication, concluded that where a dispute implicates the labor market, antitrust actions should not be allowed to subvert federal labor law policies. *Wood*, 809 F.2d at 963. In this case, labor market disputes are the central concern. As such, this dispute is one to be resolved by federal labor law.

This reasoning mandates that the appropriate standard to apply is the *Powell II* standard. Antitrust immunity exists as long as a collective bargaining relationship exists. *Powell II*,

930 F.2d at 1303-04. Accordingly, the NBA is granted the declaration it seeks—the continued implementation of these challenged measures by the NBA do not violate the antitrust laws as long as the collective bargaining relationship exists.

This does not mean that the Players are "stuck" with these provisions forever. Certainly, they can attempt to bargain these provisions away—including exerting economic pressure by means of a strike. Or, the Players may request decertification of the NBPA as a collective bargaining agent. I do not mean by this ruling to encourage the Players to decertify their union so that they may bring an antitrust claim. But, decertification is certainly an option the Players have. In fact, this is exactly what the National Football League Players Union did following *Powell II*. *See Powell v. National Football League*, 764 F. Supp. 1351, 1356 (D. Minn. 1991). Decertification, however, brings with it other consequences, namely the elimination of many federal labor remedies. In other words, the NBPA is a private actor with a variety of available choices. It is up to the Players to weigh the risks of all their actions. While I am not unconcerned that this decision may affect their decision to decertify, I simply note that the Players may not have it both ways. They may not avail themselves to the benefits of federal labor and antitrust law at the same time.

(2) *Antitrust Analysis*

It appears that even if the nonstatutory exemption did not apply, the Players' charge of a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, is insufficient to carry the day. It has often been recognized that any contract between an employer and employee is a restraint of trade. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 243-44, 62 L. Ed. 683 (1918). Therefore,

> Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anti-competitive that each is illegal *per se* without inquiry into the harm it has actually caused. Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to

> compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 2740 (1984) (citations omitted). *See also Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-51, 97 S. Ct. 2549, 2557-58, 53 L. Ed.2d 568 (1977). Professional athletic associations are more generally, and appropriately, characterized as joint ventures. *North American Soccer League v. National Football League*, 670 F.2d 1249, 1251 (2d Cir. 1982). As the Court of Appeals for the District of Columbia put it, describing the National Football League:

> [T]he NFL clubs which have "combined" to implement the draft are not *competitors* in any economic sense. The clubs operate basically as a joint venture in producing an entertainment product—football games and telecasts. No NFL club can produce this product without agreements and joint action with every other team. To this end, the League not only determines franchise locations, playing schedules, and broadcast terms, but also ensures that the clubs receive equal shares of telecast and ticket revenues. These economic joint venturers "compete" on the playing field, to be sure, but here as well cooperation is essential if the entertainment product is to attain a high quality: only if the teams are "competitively balanced" will spectator interest be maintained at a high pitch. No NFL team, in short, is interested in driving another team out of business, whether in the counting-house or on the football field, for if the League fails, no one team can survive.

Smith v. Pro Football, Inc., 593 F.2d 1173, 1178-79 (D.C. Cir. 1978) (emphasis in original). *See also Mackey*, 543 F.2d at 619 ("Although businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules here, fashioned in a different

context."). As the College Draft, Right of First Refusal, and Salary Cap do not meet stringent per se conditions, (*North American Soccer League*, 670 F.2d at 1258), the legitimacy of these restraints depends upon their reasonableness.

The rule of reason, as set forth in *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed.2d 637 (1978), considers whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." *Id.* at 690, 98 S. Ct. at 1365 (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 58, 31 S. Ct. 502, 515, 55 L. Ed. 619 (1911)).

> Unreasonableness under that test could be based either (1) on the nature or character of the [conduct] or (2) on surrounding circumstances giving rise to the inference or presumption that [it was] intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Id. (citations omitted)

Even under a rule of reason analysis, however, it appears that the Players have failed to show that the alleged restraints of trade are on balance unreasonably anti-competitive. The pro-competitive effects of these practices, in particular the maintenance of competitive balance, may outweigh their restrictive consequences. Indeed, the Salary Cap seems to operate as a mechanism to distribute 53 per cent defined gross revenue to the Players. (Tr. at 108-09). *See Mackey*, 543 F.2d at 623 ("It may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this.").

CONCLUSION

For the foregoing reasons, the NBA and Teams' continued implementation of the college draft, right of first refusal, and the salary cap is hereby declared not to violate antitrust laws. This

ruling mandates that the Players' counterclaims be denied. Parties are once again urged to pursue the only rational course for the resolution of their disputes; that is, a course of collective bargaining pursued by both sides in good faith. No court, no matter how highly situated, can replace this time honored manner of labor dispute resolution. Rather than clogging the courts with unnecessary litigation, the parties should pursue this course.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

United States Court House
40 Foley Square
New York 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of March one thousand nine hundred and ninety-five.

National Basketball

v Dkt No: 94-7709

Williams

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellants Charles L. Williams, et al,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By:_____
Carolyn Clark Campbell,
Chief Deputy Clerk

Filed: March 24, 1995
George Lange III, Clerk

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Attorneys for Plaintiffs and
Counterclaim Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
94 Civ. 4488 (KTD)

NATIONAL BASKETBALL ASSOCIATION, *ET AL.*,
Plaintiffs,

-against-

CHARLES L. WILLIAMS, *ET AL.*,
Defendants.

DOMINIQUE WILKINS, *ET AL.*,
Counterclaim Plaintiffs.

JUDGMENT

WHEREAS, the National Basketball Association and its member teams (collectively, the "NBA") sought a declaration, pursuant to 28 U.S.C. §§ 2201-02, against the below-defined class of NBA players and prospective NBA players that continued implementation of the college draft, the right of first refusal and the salary cap would not violate the antitrust laws, or alternatively, that these measures are not unreasonable restraints of trade and therefore do not violate the antitrust laws; and

WHEREAS, the same below-defined class of NBA players and prospective NBA players and the National Basketball Players Association (collectively the "Players") asserted counterclaims alleging that continuation of the draft, right of first refusal and salary cap violate the antitrust laws; and

WHEREAS, the Players sought a temporary restraining order and preliminary injuction (1) to enjoin the NBA from entering into player contracts with current or prospective professional basketball players and (2) to schedule an expedited trial on the merits; and

WHEREAS, on June 28, 1994, the Honorable John F. Keenan granted a temporary restraining order and set a hearing date for the preliminary injunction motion; and

WHEREAS, on July 8, 1994, this Court, pursuant to Fed. R. Civ. P. 65(a)(2), consolidated the preliminary injunction hearing with the trial on the merits and ordered a factual hearing for July 12, 1994; and

WHEREAS, on July 12, 1994, a consolidated factual hearing was conducted; and

WHEREAS, at the consolidated factual hearing, the Players consented to the maintenance of the action as a class action pursuant to Fed. R. Civ. P. 23(b)(1) and 23(b)(2), on behalf of and against: (1) all basketball players who were, are or will be under contract to a team in the NBA from the date of formal expiration of the 1988 Collective Bargaining Agreement

through the date of a final judgment in this action; and (2) all college and other basketball athletes who, from the date of formal expiration of the 1988 Collective Bargaining Agreement through the date of a final judgment in this action, were, are or will be eligible under the Constitution and By-Laws of the NBA to play basketball for an NBA team; and

WHEREAS, findings of fact and conclusions of law have been made; and adequate notice has been given; and good and sufficient cause appears therefor; and after due deliberation; it is

ORDERED AND ADJUDGED that this action is certified as a class action pursuant to Fed. R. Civ. P. 23(b)(1) and (b)(2) on behalf of and against the above-described class of NBA players and prospective NBA players; and it is

ORDERED, ADJUDGED AND DECLARED that the NBA's continued implementation of the college draft, right of first refusal and salary cap does not violate the antitrust laws as long as it is implemented as part of a continuing collective bargaining relationship; and it is

ORDERED AND ADJUDGED that the Players' counterclaims are denied. The TRO is dissolved and the bond discharged. No costs, disbursements or fees will be allowed.

Dated: New York, New York
July 22, 1994

[/s/]Kevin Thomas Duffy

United States District Judge

Filed: July 25, 1994
U.S. District Court
S.D. of N.Y.

A41
No. 94-7709

IN THE

United States Court of Appeals For the Second Circuit

NATIONAL BASKETBALL ASSOCIATION, *ET AL.*,
Plaintiffs-Appellees,

v.

CHARLES L. WILLIAMS, *ET AL.*,
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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[Tables of Contents and Authorities Removed]
No. 94-7709

IN THE
United States Court of Appeals
For the Second Circuit

NATIONAL BASKETBALL ASSOCIATION, *ET AL.*,

Plaintiffs-Appellees,

v.

CHARLES L. WILLIAMS, *ET AL.*,

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT OF ISSUE PRESENTED

Whether, after a collective bargaining agreement expires, management may claim the nonstatutory labor exemption from the antitrust laws for a labor market restraint for as long as the collective bargaining relationship exists.[1]

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[1] The United States does not address the district court's alternative ruling that as a matter of substantive antitrust law the challenged practices are not unlawful.

STATEMENT OF THE CASE

1. The National Basketball Association and its member teams ("NBA") on June 17, 1994, sued several of their players and their union ("Players") seeking a declaratory judgment that various of their practices do not violate the federal antitrust laws. The defendants counterclaimed alleging that the practices do violate the antitrust laws and sought preliminary injunctive relief. The district court (Hon. Kevin Duffy) consolidated the matters for trial pursuant to Rule 65(a)(2), Fed. R. Civ. P., and on July 18, 1994, it entered judgment for the NBA. The Players immediately appealed and on July 19, 1994 filed a motion to expedite the appeal. The Court on July 21, 1994 granted that motion.

2. In 1988 the NBA and the players signed a collective bargaining agreement to last until the conclusion of the 1993-1994 season. It provided for a draft of eligible college players, the right of first refusal for existing teams when its restricted free agent players sought to sign with another team, and a cap on overall player salaries. Earlier this year the parties started bargaining toward a new agreement, but when the existing agreement expired on June 23, 1994, they had not been able to agree on these issues. The players claimed that if management continued the practices it would violate the antitrust laws. Further efforts to negotiate, according to the district court, were unsuccessful. Both parties turned to the court for relief.

The district court after a consolidated preliminary injunction hearing/merits trial ruled for the NBA. Following the Eighth Circuit's decision in *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), it held that the NBA's nonstatutory labor exemption continues "as long as a collective bargaining relationship exists." Slip op. at 24. Alternatively, the court held on the antitrust merits that the challenged agreements do not violate the antitrust laws. *Id.* at 25-28.

ARGUMENT

1. The United States believes that the *Powell* standard adopted by the district court substantially overstates the scope of the nonstatutory labor exemption from the federal antitrust laws. The reasons for our position are expressed at length in a brief we filed in the Supreme Court in support of the petitioners in that case. Brief for the United States as Amicus Curiae, *Powell v. National Football League*, S. Ct. No. 89-1421 (1990). Since that brief is before the Court, we will summarize here.[2]

Employer-imposed restraints affecting only labor markets are not beyond the scope of the antitrust laws. *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (L. Hand, J.); *id.* at 413 (Frank, J.); *Radovich v. NFL*, 352 U.S. 445 (1957); *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926). Rather, such immunity as these restraints enjoy is inferred due to the need to reconcile the antitrust laws with the important congressional policy favoring collecting bargaining expressed in the National Labor Relations Act. *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-622 (1975). The broad thrust of that Act, however, is to expand the protection afforded employees. And nothing in the NLRA shows any congressional intent broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. Thus, the immunity should last no longer than clearly necessary to the successful functioning of the statutory labor scheme.

We think that as a matter of logic that point is impasse in the bargaining, for that is the point at which the labor laws let management bring to bear important new legal and economic leverage—such as unilaterally imposing new terms consistent with a good faith pre-impasse bargaining position. *See generally Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988). But, because impasse is not always readily

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[2] The Players have submitted copies to the Court, and thus we will not burden the Court with yet more copies.

identifiable, *see id.* at 552, and because the labor laws counsel caution in declaring an impasse, we believe that appropriate deference to the policies of the labor laws would counsel recognizing the immunity for a reasonable period beyond impasse to allow the employer to ascertain, upon advice of counsel, that impasse has occurred and to adjust its business operations so as to avoid antitrust liability.

How long after impasse the nonstatutory labor exemption should last is not a question susceptible of simple, bright-line treatment in all cases. A variety of factors might be taken into account in determining whether employers were reasonably on notice that impasse had occurred and whether they had had reasonable opportunity to react. In some circumstances, however, it will be clear that that point has been reached. For example, if the employer avails himself of rights that accrue only upon impasse, such as the right unilaterally to impose new terms of employment, there can be little doubt that he understands that the negotiations have reached impasse.

Extending the immunity beyond that point to the end of the collective bargaining relationship, as *Powell* and the district court opinion do, forces the union to give up the collective bargaining relationship—i.e., be decertified as collective bargaining agent—in order to claim antitrust rights. While this result seemed not to trouble the district court (Op. at 25), we are convinced that such a rule disserves both labor and antitrust interests and that Congress in enacting a worker protection statute never intended it.

2. Because the district court based its holding as to immunity solely on its conclusion that the nonstatutory labor exemption continues so long as there is a collective bargaining relationship, that holding constitutes legal error and the judgment should not be affirmed on that ground. It is not possible to determine from the district court's findings whether the NBA's conduct to date is immune under a proper interpretation of the exemption. The Players take the position that impasse has been reached, but the NBA disagrees. The district court made no finding on the point because, under the

legal standard it adopted, impasse has no significance. It also lacked any reason to consider whether, if impasse has occurred, the NBA has had a reasonable opportunity to ascertain that fact and to make adjustments.

Moreover, it is not clear whether the district court's order declaring "continued implementation" of the disputed terms not to violate the antitrust laws as long as it is implemented as part of a continuing collective bargaining relationship (Op. 24-25) authorizes unilateral changes in those terms after impasse. The NBA's complaint appears broadly to claim the nonstatutory labor exemption for fulfilling obligations or exercising rights under the federal labor laws, within a collective bargaining relationship.[3] The district court apparently agreed, emphasizing that labor law governs all disputes arising between parties in a collective bargaining relationship. See Op. 13, 18, 24, 25. Nothing in the court's opinion suggests that any event short of decertification of the union would terminate the exemption. Thus, the district court's decision may immunize conduct that would clearly fall outside the exemption as we understand it.

CONCLUSION

Because the district court based its holding as to immunity solely on its conclusion that the nonstatutory labor exemption continues so long as there is a collective bargaining relationship, that holding constitutes legal error and the judgment should not

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[3] The NBA's complaint expressly states that it has the "right under the federal labor laws" not only to continue in effect the terms of the expired contract but also "to make unilateral changes consistent with its pre-impasse proposals." Complaint ¶ 100. It further alleged that the risk of antitrust liability was preventing it from "fulfill[ing] its obligations or exercis[ing] its rights under the labor laws" after expiration of the contract. Complaint ¶ 101. And it asserts its entitlement to a declaration that it would not violate the antitrust laws by continuing in effect the disputed provisions past the expiration of the contract "because such action is governed solely by the labor laws and is exempt from antitrust liability under the nonstatutory labor exemption to the antitrust laws." Complaint ¶ 105.

be affirmed on the ground that the nonstatutory labor exemption immunizes the NBA's conduct from antitrust scrutiny.

August 1994

Respectfully submitted,

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Nos. 93-7165 et al.

IN THE

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PRO FOOTBALL INC., *ET AL.*,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING[1]

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the antitrust laws. The extent to which those laws are held inapplicable because of federal labor law is an issue in whose correct resolution the United States has an important interest. We file this brief because of our belief that the Court's decision resolves the issue in a manner that disserves both antitrust and labor policies, and that is likely to have significantly adverse effects that reach well beyond professional sports.

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[1] Simultaneously with this Brief, the United States is filing a motion for leave to file it in support of appellants' suggestions for rehearing in banc.

ISSUE PRESENTED

Whether the National Labor Relations Act requires employees to forego unionization in order to bring an antitrust suit against employers who, by agreement among themselves, fix the wages of the employees.

STATEMENT

1. Background.

This is an antitrust suit by professional football players who were placed on "developmental squads" of National Football League teams, and paid salaries agreed upon among the team owners. A collective bargaining agreement, which had no provision for developmental squads, expired in 1987. The teams subsequently created these squads, and after union-management negotiations about compensation for squad members reached an impasse, the teams agreed among themselves to impose the salaries unilaterally. The players who were paid these salaries sued under the antitrust laws for treble damages and an injunction.

The defendants claimed that their agreement to impose uniform salaries was protected by the nonstatutory labor exemption from the antitrust laws. The district court (Lamberth, J.) struck that defense, ruling that their immunity under this exemption expired when the prior collective bargaining agreement expired, or when the parties reached impasse in their negotiations. *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 130-37 (D.D.C. 1991). Alternatively, it found no immunity because the provision had never been included in a contract. *Id.* at 137-39. Ultimately, after a jury trial, the district court awarded damages which, when trebled, totalled over $30 million and also permanently enjoined the defendants from setting regular season salaries for any category of players. *Brown v. Pro Football, Inc.*, 1993 Trade Case. (CCH) ¶ 70,260 (D.D.C.).

2. The Panel Decision

The panel in a split decision by Chief Judge Edwards reversed on the ground that the nonstatutory labor exemption from the antitrust laws immunized the defendants' conduct. The panel did not consider it dispositive that every case in which the Supreme Court has found this exemption applicable dealt with a collective bargaining agreement, because "the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a *process*, not merely on the *product* of that process" (slip op. 14). It noted that the National Labor Relations Act ("NLRA") similarly "focuses on collective bargaining as a process, rather than collective bargaining agreements alone" and established "a carefully defined bilateral process" protecting unions and employers alike (slip op. 16). Thus, the labor laws presume "a delicate balance of countervailing power" and "[i]njecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the federal labor laws" (slip op. 18).

The panel was also impressed by the decisions of the Eighth and Second Circuits to adopt a broad nonstatutory labor exemption in, respectively, *Powell v. NFL*, 930, F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and *National Basketball Association v. Williams*, 45 F.3d 684 (2d Cir. 1995). Moreover, it was unable to find a logical endpoint for an exemption that was tied to a collective bargaining agreement (slip op. 19, 20). It assumed there was little impact on antitrust policy, since the restraint primarily affected the labor market in the context of multi-employer bargaining (slip op. 22-26, quoting at length from *Williams*, *supra*). It concluded that the nonstatutory labor exemption "requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act" (slip op. 28).

Judge Wald dissented. In her view the majority's approach does not establish a "level playing field" but instead "sharply tilt[ed]" in favor of the owners (Dissent 1). She noted that the exemption endorsed by the majority went beyond any statutory

or nonstatutory labor exemption recognized by the Supreme Court or, until recently, by the courts of appeals (Dissent 8-11). The result, she said, is to strengthen the employers' position, reduce their incentive to bargain, and allow them to impose terms not just as a bargaining tactic but as a substitute for a labor contract (Dissent, 12-16, 16-23). She concluded that "terms of employment unilaterally imposed by employers after impasse are *not* exempt from antitrust scrutiny under the nonstatutory labor exemption" (Dissent 24) (emphasis in original).

ARGUMENT

THE CONCERTED IMPOSITION OF TERMS BY EMPLOYERS ON EMPLOYEES IS NOT EXEMPT FROM THE ANTITRUST LAWS

The sweeping antitrust immunity adopted by the majority has no support in Supreme Court precedent. Its requirement that employees choose between the Sherman Act and the NLRA—between antitrust relief for wage fixing by an employer cartel and membership in a union—forces an unnecessary and inappropriate choice, and weakens both antitrust and labor policy. We also agree with Judges Wald and Lamberth that the implementation of multiemployer agreements on terms of employment derives nonstatutory antitrust immunity from embodiment in a collective bargaining agreement. Since these employers imposed the disputed terms of employment on their employees without such an agreement, their action was not immune from scrutiny under the antitrust laws.

1. The immunity for unilateral employer group action adopted by the majority in this case is a new construct. Contrary to the majority's view, it is not a development of the nonstatutory labor exemption recognized by the Supreme Court. As that Court carefully summarized the law in *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 622 (1975), "a proper accommodation between congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires

that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions."

The Supreme Court's limitation to "union-employer agreements" was not inadvertent. Well before enactment of the NLRA, concerted action by a group of employers to control the labor market was recognized as unlawful under the antitrust laws. *E.g.*, *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926). The roots of the nonstatutory exemption, on the other hand, are firmly grounded in the statutory exemption for employees, which applies only "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). Not surprisingly, therefore, the nonstatutory exemption likewise protects only "the unions' successful attempt to obtain [a] provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups." *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965). *Accord*, *United Mine Workers v. Pennington*, 381 U.S. 657, 661-64 (1965) ("a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws"). The results of the various cases addressed by the Supreme Court have been equally unequivocal: collective bargaining agreements immediately promoting the unions' interests in eliminating competition based on wages and working conditions have been uniformly upheld, while those based on employer interests (including interests in their competitors' employment standards) have been rejected. *Compare American Federation of Musicians v. Carroll*, 391 U.S. 99, 107-12 (1968); *Jewel Tea*, *supra*, at 691-97; *Teamsters Union v. Oliver*, 358 U.S. 283, 293-94 (1959), *with FMC v. Pacific Maritime Ass'n*, 435 U.S. 40, 61-62 & n.20 (1978); *United Mine Workers v. Pennington*, *supra* 666-67; *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 809-11 (1945).[2]

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[2] In *Connell*, even an agreement with a union was held non-exempt in part because the union did not represent the signatory firm's employees. 421 U.S. at 625-26.

Thus the Eighth Circuit was merely stating established law when it held that the nonstatutory exemption applies only to agreements that are "the product of bona fide arm's length bargaining" with the unions. *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).[3] *Accord*, *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 463 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

2. The majority's decision, unlike the established body of law, does not base the nonstatutory labor exemption on workers' collective bargaining agreements. Instead, it creates a new, far broader implied antitrust immunity for employers based on the "process" of collective bargaining contemplated by the National Labor Relations Act, and in doing so strays far from the statutory grounding of the exemption.

While the antitrust laws and the labor laws are both expressions of fundamental national policy, courts have no roving mandate to favor one over the other. Ordinarily, of course, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden*, 308 U.S. 188, 198 (1939). Creation of a new implied antitrust immunity under the NLRA is form of implied repeal. It is "well-established" that such repeal "is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. . . . Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary." *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378, 388-89 (1981) (internal citations omitted). The "accommodation" of labor and antitrust policies underlying the established exemption for union-employer agreements, *Connell*, *supra* at 622, does not imply a less stringent test, for it is firmly grounded in what "labor policy requires," *ibid.*, and overrides the antitrust laws only to the extent there is a "conflict" with such a requirement. *See Pennington*, *supra* at 666. But in this

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[3] Even the Eighth Circuit's more recent decision in *Powell v. National Football League*, *supra*, places its roots in this well-established body of precedent.

case, there is no conflict requiring a new exemption. Rather, the employers are seeking to establish, from a statute meant to enhance workers' rights to unionize, an implied Congressional intent to create a sweeping pro-management antitrust exemption which workers can avoid only by avoiding unions. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965).[4] In that context, they have not come close to making the showing necessary for an immunity based on the process of bargaining.

The NLRA does primarily regulate the process of collective bargaining (slip op. 16). Under the labor laws, however, that process is not an end in itself, but a means to an end. It is a "process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). The existing nonstatutory labor exemption, therefore, is simply a common sense recognition of the fact that the ultimate purpose of the labor laws and of the statutory labor exemption would be frustrated if such labor contracts, once reached, were declared invalid under the antitrust laws. *See Meat Cutters v. Jewel Tea Co.*, *supra*, 381 U.S. 711-12 (opinion of Goldberg, J.). The only question in such cases is how far into the product market the

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[4] Since these workers have chosen a union and would be deprived of that choice as the price of bringing an antitrust suit, the proposed new exemption stands on its head the concept of "voluntary unionism" embodied in the labor laws. Compare *Pattern Makers' League v. NLRB*, 473 U.S. 95, 105 (1985) (cited at slip op. 18).

negotiated restraints may extend.[5] Unilateral action by a group of employers to impose the terms that they should be negotiating with their employees' representatives plainly does not occupy the privileged position of being the desired end product of the bargaining process.

The majority nonetheless thought that unilateral employer agreements during the bargaining process should be totally immunized, because applying the antitrust laws would disrupt "the delicate balance of countervailing power" "by giving unions a powerful new weapon, one not contemplated by the federal labor laws" (slip op. 18). That reason is seriously mistaken, however. There are numerous federal statutes, such as the Fair Labor Standards Act and the Occupational Health and Safety Act, which favor unions by raising the baseline from which negotiations start. The antitrust laws, we submit, are no different; their application simply means that negotiations should ordinarily start from a competitive wage level rather than a level set by an employer cartel.[6]

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[5] Three sets of opinions in the *Pennington* and *Jewel Tea* cases illustrate the dispute. Justice Goldberg would have held the agreements in both cases exempt from the antitrust laws as union contracts involving mandatory subjects of collective bargaining. 381 U.S. at 735. Justice Douglas would have held both agreements fully subject to the antitrust laws because they restrained the product markets. *Id.* at 672, 735. Justice White writing for the Court in *Pennington* found that wage agreement not exempt because it imposed terms outside the bargaining unit, *id.* at 665-66, and in *Jewel Tea* he thought the agreement exempt because the restraint on marketing hours had an "immediate and direct" effect on the working hours of the covered employees. *Id.* at 691.

A restraint on marketing hours similar to that in *Jewel Tea*, but adopted unilaterally by a group of employers to placate their salesman and fend off unionization, was found not exempt in *In re Detroit Auto Dealers Ass'n*, *supra*, 955 F.2d at 461-67.

[6] In the case of sports leagues, their joint venture characteristics might sometimes justify rule of reason treatment of unilateral league restraints on wage competition that would be considered per se illegal in different industries. *See McNeil v. NFL*, 790 F. Supp. 871, 896-97 (D.Minn. 1992). That is a matter separate from any labor exemption, however, and is not before the Court.

More importantly, the labor laws themselves are not concerned with any particular balance of power between unions and employers and are not intended to equalize the parties' bargaining power. *NLRB v. Insurance Agents' Int'l Union*, *supra*, 361 U.S. at 490. Indeed, the Supreme Court specifically held in that case that the Board may not attempt to "regulate the choice of economic weapons that may be used as part of collective bargaining." *Id.* at 490-98. But that is precisely what the majority has done here. It strips organized employees of an antitrust cause of action because it considers such a suit too powerful an economic weapon, and conversely those same employees to bring an antitrust action only if they surrender their right to unionize. There is simply no warrant in the labor laws for that holding and for the wholesale displacement of the antitrust laws it entails.

3. The panel's majority's creation of a new and unsound antitrust exemption for management is sufficient reason for the Court to grant rehearing. But since at least one factor in the majority's thinking was its dissatisfaction with various tests for determining when the management's nonstatutory exemption ends (slip op. 19-21 & n. 6), we wish briefly to address this point.

There is a strong argument that the recognized nonstatutory labor exemption should end when the contract containing the collective bargaining agreement has expired and the parties in post-expiration negotiations for a new contract have reached impasse. Up to that point the labor laws generally require employers to maintain the wages and working conditions set in the expired collective bargaining agreement. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). If the antitrust exemption were withdrawn before impasse, employers would risk treble damage liability under the antitrust laws by complying with the labor laws' mandate to maintain the prior collectively set terms. But once impasse occurs, employers are free under the labor laws to alter the status quo and impose new terms of employment without regard

to the union's consent, so long as they are within the scope of good faith proposals previously made to the union.

In practical world of labor-management relations, however, the precise point of impasse often is not easily identified and requires a complex factual determination. Moreover, the labor laws counsel caution in declaring an impasse in bargaining. Thus, there is a justification in labor policy for the implied immunity to endure for a reasonable time after impasse—for example, for such time as would be reasonable in the circumstances for the employers to take steps to ascertain, upon advice of counsel, whether impasse has in fact occurred, whether the restraint in question would be likely to violate the antitrust laws, and, if so, to adjust their business operations so as to eliminate the proposed restraint. There is also justification in labor policy for concluding that, in no event, should antitrust immunity continue once the employers, after impasse, have jointly elected unilaterally to impose their proposed terms. For such unilateral action (which would constitute an unfair labor practice if made prior to impasse) would clearly indicate the employers' assumption that impasse has occurred and their intention to impose their terms even without the union's agreement.[7]

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[7] When the members of a multi-employer group do impose terms, they may avoid antitrust liability by not acting in concert with each other—a result fully consonant with the labor laws, which leave individual employers at this point free to make temporary individual deals with the union pending adoption of a unit-wide agreement. *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 414-15 (1982).

CONCLUSION

For the reasons stated, the Court should grant rehearing or alternatively rehearing in banc.

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Respectfully submitted,

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No. 89-1421

IN THE
Supreme Court of the United States
October Term, 1990

MARVIN POWELL, *ET AL.*,

Petitioners,

v.

NATIONAL FOOTBALL LEAGUE, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether members of a multi-employer bargaining unit may claim the protection of the nonstatutory labor exemption from the federal antitrust laws after a collective bargaining contract has expired and the parties have reached an impasse in negotiations over a new contract.

[Tables of Contents and Authorities Removed]
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This brief is submitted in response to the Court's order inviting the Solicitor General to express the view of the United States.

STATEMENT

Petitioners are professional football players[1] who claim that respondents, the National Football League (NFL) and its member teams, have violated the federal antitrust laws by maintaining rules restricting the ability of players to move

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[1] The players' union is also named as a plaintiff in the complaint. After the Court of Appeals' decision, the union announced that it was abandoning its collective bargaining functions, Pet. Reply Br. 2 n.1, and it is not a named petitioner before this Court.

freely among teams after the expiration of a multi-employer collective bargaining agreement containing such rules. Respondents contend that their rules are immune from antitrust scrutiny under the nonstatutory labor exemption to the antitrust laws recognized by this Court in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), and *Connell Construction Co. v. Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616 (1975).

On cross-motions for summary judgment, the district court held the nonstatutory labor exemption applicable only until negotiations over the restraints on player mobility had reached impasse; it subsequently found that the parties had reached impasse and that, accordingly, the exemption no longer immunized respondents' conduct. Before petitioners' antitrust challenge could be tried on the merits, respondents appealed the district court's interlocutory order to the Court of Appeals pursuant to 28 U.S.C. 1292(b). The Court of Appeals reversed, holding that the antitrust exemption continued after impasse as long as "the labor relationship continues." Pet. App. 18a.

1. Restrictions on the ability of players to move among teams have long been a source of tension between respondents and the players. Understanding the legal dispute over the current system necessitates a brief discussion of its predecessor.

The "Rozelle Rule," in effect from the 1963 to 1976, generally required a team signing a contract with a player formerly employed by another team to pay compensation to that team as set by the Commissioner. That compensation, in the Commissioner's discretion, could include one or more players or future draft choices from the acquiring team. Pet. App. 87a n.8. Fear of losing veteran players or first-round draft choices discouraged teams from hiring players who had worked for other teams. From 1963 to 1976, only four players signed with other teams after their contracts expired. P. Staudohar, *The Sports Industry and Collective Bargaining* 87-88 (2d ed. 1989).

In 1974, differences over player mobility led the players' union to call a strike. R. Berry, W. Gould & P. Staudohar, *Labor Relations in Professional Sports* 125 (1986). Although most

players initially complied with the strike call, rookies and fee agents reported to training camp. After 44 days, the strike was broken and the remaining strikers returned to camp. *Id.* at 97.

The players nonetheless continued to challenge the Rozelle Rule in court. *Mackey v. NFL*, 407 F. Supp. 1000 (D. Minn. 1975), modified and affirmed, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). In *Mackey*, the players contended (and the district court agreed) that the Rozelle Rule was a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, because it constituted an employer-imposed group boycott or refusal by teams to deal with the players. 407 F. Supp. at 1005, 1009-1010. On appeal, the Eighth Circuit agreed that the Rozelle Rule violated the Sherman Act, but analyzed the restraint under the Rule of Reason. 548 F.2d at 620-622.

2. Although the defendants in *Mackey* insisted that the Rozelle Rule did not violate the Sherman Act, their principal contention then, as now, was that restrictions imposed on player mobility are immune from Sherman Act scrutiny under the nonstatutory labor exemption to the antitrust laws.

The nonstatutory exemption to the federal antitrust laws is now well established in our law. It is entirely a judicial construct. This implied exemption "has its sources in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622. To be sure, Congress has provided labor a *statutory* exemption from the antitrust laws. But that exemption only immunizes the existence of unions and certain activities undertaken by unions acting unilaterally and in their own interests to eliminate competition in the labor market. *See* Clayton Act §§ 6, 20, 15 U.S.C. 17, 29 U.S.C. 52; Norris-LaGuardia Act, 29 U.S.C. 104, 105, 113; *see also Connell*, 421 U.S. at 621-622; *United States v. Hutcheson*, 312 U.S. 219 (1941). The statutory labor exemption does not extend to "concerted action or *agreements between unions and nonlabor parties*." *Connell*, 421 U.S. at 622 (emphasis added); *see Hutcheson*, 312 U.S. at 232. For that reason, the statutory

exemption does not insulate even a collective bargaining agreement from the antitrust laws. *See United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965).

To "accommodat[e] * * * the congressional policy favoring collective bargaining under the NLRA [National Labor Relations Act] and the congressional policy favoring free competition in business markets," *Connell*, 421 U.S. at 622, this Court has concluded that the antitrust laws must recognize a further *nonstatutory* labor exemption applicable to certain conduct in which employers participate. Not only are "some union-employer agreements . . . accorded a limited nonstatutory exemption from antitrust sanctions," *ibid.*, but collective bargaining agreements eliminating competition among employers in a multi-employer bargaining unit with respect to terms of employment are also generally immune from the antitrust laws under the nonstatutory exemption, *see ibid.*; *Jewel Tea*, 381 U.S. at 689-690; *Pennington*, 381 U.S. at 664-665.

In *Mackey*, the Eighth Circuit held that the nonstatutory labor exemption did not shield the Rozelle Rule from the Sherman Act because the Rule was unilaterally imposed by the NFL and thus was not "the product of bona fide arm's-length negotiation." 543 F.2d at 615. The court of appeals found substantial evidence to support the district court's conclusion that "the parties' collective bargaining history reflected nothing which could be legitimately characterized as bargaining over the Rozelle Rule." *Ibid.*; *see id.* at 615-616.

3. As a "direct result" of their victory in *Mackey* and another case, *Alexander v. NFL*, 1977-2 Trade Cas. ¶ 61,730 (D. Minn. 1977), the players and their union achieved "a multimillion dollar cash settlement and the owners' promise to negotiate a new collective bargaining agreement." R. Berry, W. Gould & P. Staudohar, *supra*, at 98. In 1977, the players' union and the NFL signed a collective bargaining agreement that, among other things, replaced the Rozelle Rule with the Right of First Refusal/Compensation system which the players challenge in this litigation. Under the new system,

> every NFL club retains rights to "its players" even though, in the case of veteran free agents, contractual rights to a player no longer exist. When a veteran player's contract has expired and a competing NFL club makes an offer to that player, the player's old team may keep the player simply by matching the competing offer; the player's old club therefore is said to have a "right of first refusal" as to the player's services. If the competing offer is large enough, and the club to which the player was previously under contract does not choose to match a competing offer, the old club will receive draft choice "compensation" which may be extremely costly to the acquiring club.

Pet. App. 37a.

Although the Right of First Refusal/Compensation system is characterized by less discretion than the Rozelle Rule—for example, the system quantifies the compensation payable in future draft choices by reference to the acquired player's experience and salary level, rather than leaving it to the Commissioner's judgment in each case—the mobility of players subject to the rule did not increase substantially. Pet. App. 39a. At the expiration of the 1977 contract in 1982, therefore, the players' union mounted a 57-day strike. At the conclusion of the strike, the system was modified by increasing the salary level at which draft choice compensation was triggered.

The modified rule incorporated in the 1982 collective bargaining agreement, however, did not produce the mobility for which the players hoped. Pet. App. 39a.[2] When the 1982 contract expired in 1987, the players' union sought further modifications in the Right of First Refusal/Compensation system. Negotiations failed to reach an accord on that issue, and the players' union called another strike. After 24 days, the strike was broken and the players resumed work without a contract. No contract has since been signed. Pet. App. 40a.

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[2] From 1977 to 1987, only one free agent signed with another team. P. Staudohar, *supra*, at 89.

4. On the day the 1987 strike ended, petitioners and the players' union filed suit against respondents, claiming, *inter alia*, that the Right of First Refusal/Compensation system violates Section 1 of the Sherman Act, 15 U.S.C. 1.[3] Petitioners moved for partial summary judgment and an injunction against respondents' continued implementation of the Right of First Refusal/Compensation system. Pet. App. 35a, 40a. Respondents filed a cross-motion for summary judgment seeking a declaration that the challenged restraints were immune from antitrust scrutiny by virtue of the nonstatutory labor exemption. *Id.* at 35a, 43a.

On January 29, 1988, the district court ruled that the player restraints, having been included in the 1982 labor contract as a result of good faith collective bargaining, were exempt from the antitrust laws by virtue of the nonstatutory labor exemption for the duration of the contract. It further ruled that the exemption continued after "expiration of the collective bargaining agreement until the parties reach impasse *as to that issue*." Pet. App. 54a; *see id.* at 47a-50a. Impasse is the point at which the parties, "following intense, good faith negotiations," have "exhausted the prospects of concluding an agreement." *Id.* at 54a. Because the National Labor Relations Board was then considering whether negotiations had reached impasse, in connection with the NFL's charge that the union was not bargaining in good faith, the district court stayed proceedings until the Board ruled. *Id.* at 56a-57a.

The Board's General Counsel thereafter concluded that the parties had reached a "bona fide impasse in negotiations," and therefore dismissed the NFL's charge (and an amended charge). *NFL Players' Ass'n*, Case 2-CB-12117, Advice Mem. at 8. On June 17, 1988, the district court, "accord[ing] some weight" to the General Counsel's views, 6/17/88 Tr. 3-4, agreed that the parties had reached an impasse on the issue of player restraints and therefore held that continued imposition of those restraints

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[3] The players also challenged the College Draft and the standardized Player Contract. They sought injunctive relief and damages on all counts.

would be subject to the antitrust laws. *Powell v. NFL*, 690 F. Supp. 812, 814 (D. Minn. 1988). The district court denied petitioners' motion for a preliminary injunction, however, in light of the requirements of the Norris-LaGuardia Act (which generally prohibits the courts from granting injunctions in labor disputes, 29 U.S.C. 101, 107) and the court's own determination that an injunction would "irreparably harm the owners and have a deleterious effect upon professional football generally" and "wholly subvert the collective bargaining process." 690 F. Supp. at 816, 817.

On January 6, 1989, the district court granted respondents' motion to certify its January 29, 1988, order for interlocutory appeal under 28 U.S.C. 1292(b). That order was recertified, at respondents' request, on February 17, 1989.

5. The court of appeals accepted the interlocutory appeal. In a divided ruling, it reversed the judgment of the district court and remanded with instructions to enter judgment for respondents.

The majority disagreed with the district court that the nonstatutory labor exemption ends at impasse. It noted that impasse in labor negotiations is common and usually temporary, Pet. App. 9a-10a, and that bargaining is governed by "a comprehensive array of labor law principles" both before and after impasse, *id.* at 12a-13a, 15a. In addition, "disputes over employment terms and conditions are not the central focus of the Sherman Act." *Id.* at 13a. Having accepted the "level playing field" of the labor arena, the court concluded, the parties should be required to continue to fight on it, "so that bargaining and the exertion of economic force may be used to bring about legitimate compromise." *Id.* at 17a.

The court acknowledged that respondents had modified the Right of First Refusal/Compensation system (by reducing the number of players to which it applied) after the district court found that the parties had reached an impasse in negotiations over player restraints. Pet. App. 17a & n.10. In spite of the unilateral nature of this change, the court of appeals ruled that the players and their union could not challenge the modified

system because they did not contend that respondents had proposed or implemented the change in bad faith. *Id.* at 17a. Although the court insisted that "this does not entail that * * * management is forever exempt" from the antitrust laws, it refused to "look into the future and pick a termination point." *Id.* at 17a-18a. The court was "satisfied that as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies." *Id.* at 18a.

Senior Circuit Judge Heaney dissented. He agreed with the district court that the labor exemption terminates at impasse. Pet. App. 21a. In his view, "the end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights." *Id.* at 28a.

The court of appeals, by a 7-2 vote, denied rehearing *en banc*. Chief Judge Lay and Judge McMilliam dissented from that denial on the ground of a conflict with *Mackey* Pet. App. 27a-32a.

DISCUSSION

This case presents a difficult question of first impression in this Court: whether, and for what period after a collective bargaining agreement expires, the nonstatutory labor exemption to the antitrust laws shields a labor market restraint embodied in the expired agreement. The answer to that question is not supplied by this Court's decisions in *Pennington*, *Jewel Tea*, or *Connell*. Each of those cases determined whether the nonstatutory labor exemption immunized from antitrust scrutiny a challenged restraint incorporated in a collective bargaining agreement. This case presents the different, but related, question whether such an "exemptable" restraint remains insulated from the antitrust laws after the collective bargaining agreement expires.

As in this Court's earlier cases, resolution of that question requires harmonization of the fundamental national policies

embodied in the labor laws and the antitrust laws. This Court repeatedly has recognized that, while "[t]he basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act * * * and the Norris-LaGuardia Act, * * * a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Connell*, 421 U.S. at 621-622; *see id.* at 621-623; cf. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-513 (1988).

In order to avoid improper intrusion into the legislative policymaking role, the courts, in fashioning this "limited nonstatutory exemption," should be mindful of the principle that *implied exemptions* to the antitrust laws are *disfavored*. In consequence, those judicially created exceptions to the critical mandate of the antitrust laws should be no broader than clearly necessitated by the public policy requiring their recognition. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

In light of these principles, we believe that the court of appeals correctly rejected respondents' suggestion that the antitrust laws have no role to play with respect to pure labor market restraints. At the other extreme, the lower courts were likewise correct to reject petitioners' contention that the antitrust laws become applicable immediately upon expiration of the collective bargaining agreement if the union does not consent to continuation of a restraint. But while the court of appeals correctly rejected the polar positions pressed by the parties, its own formulation of the nonstatutory labor exemption was, we believe, overly expansive.

1. Respondents suggest that, because only a labor market restraint is involved, it should make no difference to the antitrust exemption whether an employer, a union, or both in

concert seek to eliminate competition. Citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), respondents submit that the antitrust laws are not concerned with restraints on competition in labor markets, if there is no effect on a "product market." Br. in Opp. 14-15. The Court in *Apex*, relying on Section 6 of the Clayton Act, 15 U.S.C. 17, observed that "restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act." 310 U.S. at 502-503.

But the Court's statement in *Apex* was made in a suit by an employer against a union and its officials. And Section 6 of the Clayton Act, although it provides that "[t]he labor of a human being is not a commodity or article of commerce," focuses on protection of unions and expressly immunizes from the antitrust laws only the existence of unions and certain union activities. The federal courts therefore have generally concluded (correctly, in our view) that neither *Apex* nor Section 6 puts collective action by employers to restrict competition in a labor market outside the scope of the antitrust laws. *See, e.g.*, *Mackey*, 543 F.2d at 616-618; *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197 n.7 (6th Cir. 1979); *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (L. Hand, J.); *id.* at 413 (Frank, J.); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 742 (D.D.C. 1976), aff'd in part, rev'd in part, 593 F.2d 1173 (D.C. Cir. 1978); *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970). Those decisions comport with decisions of this Court that, while not referring specifically to the labor exemption, hold that employees may raise antitrust challenges to collective employer action with respect to terms of employment. *Radovich v. NFL*, 352 U.S. 445 (1957); *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926). The court of appeals thus properly rejected respondents' suggestion that employer-imposed restraints affecting only labor markets are beyond the scope of the antitrust laws.

2. The court of appeals was also correct to reject petitioners' contention that the nonstatutory labor exemption protects only restraints to which the union currently agrees—a position that

would dictate termination of the nonstatutory labor exemption immediately upon expiration of a collective bargaining agreement (at least if the union has made it clear that it will not agree to continuation of the provision). *See* Pet. 12; Pet. Reply Br. 5. That view affords insufficient deference to the "federal policy favoring collective bargaining." *Connell*, 421 U.S. at 626. In particular, it cannot be reconciled with the obligation of employers under the labor laws to maintain the terms of employment established by an expired collective bargaining agreement until impasse. *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962). If the antitrust exemption were withdrawn before impasse, and employers feared that continued adherence to particular terms pending negotiation of a new agreement would constitute an antitrust offense, they could find themselves in a dilemma: modify the objectionable terms (and risk committing an unfair labor practice, because the NLRA forbids unilateral changes in working conditions prior to impasse, *see Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988)); or adhere to the terms (and risk treble damages under the antitrust laws).

It is true that employers would not violate the labor laws by unilaterally changing terms and conditions of employment prior to impasse with union concurrence. But allowing the union to dictate termination of the antitrust exemption upon contract expiration would tend to undermine the collective bargaining process. When unions and employers agree to a contractual provision, they know that it will continue in effect at least until impasse, should the current contract expire before a new contract is negotiated. That expectation plays an important role in facilitating collective bargaining. "'Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.'" *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 544 n.6 (quoting court of appeals' opinion). Terminating the antitrust exemption immediately upon expiration of the collective bargaining agreement would gratuitously intrude force before the opportunity for a non-coercive solution has

been exhausted. *See Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 965-966 (D.N.J. 1987). Accordingly, the courts below correctly held that the nonstatutory labor exemption should continue after the contract expires.[4]

3. a. We believe, however, that the court of appeals erred in holding that the nonstatutory labor exemption continued indefinitely beyond impasse. The court of appeals reasoned—in light of the "comprehensive array of remedies" provided by labor law "to management and union, even after impasse," Pet. App. 15a—that the nonstatutory labor exemption must protect any restriction "conceived in an ongoing collective bargaining relationship." *Id.* at 18a.[5] Although the court of appeals asserted that it was not holding that management was "forever exempt," its opinion suggests no point short of the end of the "ongoing collective bargaining relationship" at which the exemption would terminate. *Id.* at 17a-18a. Although this view would obviously be within the broad range of policy choices available to Congress, it is not properly confined as an implied exemption necessitated by the labor policy Congress has thus far enacted.

Neither the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship—rights that presumably would continue to exist for other, non-unionized workers. To the contrary, the predominant thrust of the statute (and of related enactments such as the Norris-LaGuardia Act) is to expand the

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[4] This case does not present the question whether the nonstatutory labor exemption reaches restraints to which the union has never agreed. Petitioners do not dispute that the 1982 agreement was a collective bargaining agreement negotiated at arm's length and in good faith.

[5] It included in that category the modifications to the player restrictions imposed by the respondents without union agreement. Pet. App. 17a & n.10.

protection afforded employees. While the labor laws are, of course, designed to promote and encourage the process of collective bargaining, there is insufficient support in that general statutory policy for the court of appeals' conclusion that an antitrust exemption should shield an employer-imposed restraint that originated in an expired contract as long as the collective bargaining relationship exists. As a policy judgment, Congress could reasonably conclude that so comprehensive an exemption is desirable and should be enacted. But the role of the courts is not similarly to choose among rational predictive policy alternatives; it is instead to fashion an implied exemption no broader than clearly necessary to the successful functioning of the statutory scheme.

b. On the other side of the scale weighs the antitrust laws' proscription of anticompetitive restraints. The immunity conferred by the nonstatutory labor exemption is of significance principally where the challenged restraints would otherwise violate the antitrust laws. By hypothesis, then, we should assume—as the Eighth Circuit found in *Mackey*—that restrictions on player mobility injure the players in their business or property under the antitrust laws.[6]

We should also recall (*see* p. 9, *supra*) that restrictions on player mobility are not exempt from the antitrust laws, but only "exemptable" by means of a collective bargaining agreement. For that reason, the prospect of vulnerability to an antitrust claim is not an alien element that would be introduced into the collective bargaining process for the first time upon termination of the implied exemption. To the contrary, the value of the nonstatutory labor exemption is one of the benefits the respondents bargained for and received when the parties signed

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[6] There has been no finding in this case that the Right of First Refusal/Compensation system violates the Sherman Act, and we express no opinion on that issue. In *Mackey*, however, the Eighth Circuit found "ample evidence to support the district court's findings that plaintiffs have been injured in their business or property" by the Rozelle Rule, which preceded the Right of First Refusal/Compensation system at issue in this litigation. 543 F.2d at 623.

the 1977 collective bargaining agreement. In the absence of that agreement, the Right of First Refusal/Compensation system would have been open to challenge under the Sherman Act, just as the Rozelle Rule had been challenged (successfully) in *Mackey*. By incorporating the Right of First Refusal/Compensation system into the 1977 collective bargaining agreement, respondents purchased antitrust immunity, presumably in exchange for an agency shop, pension and insurance benefits, or some other consideration valued by the players. In essence, the players bargained away their antitrust chose in action (and the ongoing injury they presumably suffered) as a quid pro quo for compensation in some other form.

By extending the nonstatutory labor exemption past the time when the employers may unilaterally diminish or rescind elements of that quid pro quo (as they are permitted to do after impasse has been reached), the court of appeals has created an inherently destabilizing asymmetry between the initial collective bargaining agreement and all successor agreements. Its rule effectively gives the party benefitting from a potentially anticompetitive restraint (the respondents, in this case), the benefit of the antitrust exemption without having to pay for it. As Circuit Judge Heaney pointed out in dissent, "the majority has intervened to remove the players' rights under the antitrust laws from the bargaining table." Pet. App. 25a.

Under the rule adopted by the court of appeals, the party burdened by the anticompetitive restraint (in this case, the players, as represented by their union) would apparently be relegated to three unsatisfactory options: (1) accede to the other side's terms (which are unlikely to represent a legitimate compromise because the other side is unlikely to pay for an antitrust exemption it can continue to enjoy for free); (2) call a strike (albeit with diminished chance of success because one of the levers available to achieve the initial contract—the credible threat of antitrust damages—is removed by perpetuation of the nonstatutory labor exemption after impasse); or (3) terminate the collective bargaining relationship and start from scratch. It is questionable whether that result is even appropriately

compatible with the policies of the labor laws. It surely is not sufficiently essential to the successful implementation of those policies to warrant a judicial finding of an implied exemption from the normal operation of another duly enacted Act of Congress (the Sherman Act).

c. An analytically logical point for termination of the implied immunity flowing from an expired collective bargaining agreement is when the parties have reached an impasse in their negotiations over a new collective agreement. "The definition of 'impasse' is understandable enough—that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 543 n.5 (quoting R. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 448 (1976)). At impasse, additional tools, economic and legal, are ordinarily brought into play to prompt the parties to reconsider their positions and come to an understanding. For example, employers are free under the labor laws to make unilateral changes in the terms of employment after impasse, so long as the changes have been offered as good faith proposals in bargaining. *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 415-416 n.9 (1982). Such unconsented changes, if made prior to impasse, would be unfair labor practices remediable in Board proceedings. Moreover, members of a multiemployer bargaining unit are free to negotiate individual agreements on an interim basis with the union after impasse. *Ibid.* Since the labor laws authorize and contemplate independent employer action and changes in the terms of employment at impasse, labor policy no longer requires that employers be comprehensively shielded from the antitrust laws if they elect collectively to maintain or enforce provisions inconsistent with the antitrust laws after that time.

Although impasse therefore seems the theoretical fulcrum for termination of the implied immunity, certain practical difficulties would be presented by a rule dissolving the immunity immediately upon impasse. It is not always clear even in retrospect—and certainly not always immediately clear to the

parties—precisely when impasse occurs. Moreover, the labor laws, which are designed to promote collective bargaining and which prohibit unilateral change before impasse but allow it after impasse, seem to prefer caution, rather than prematurity, in concluding that further bargaining is futile. For these reasons, there is justification in labor policy for the implied immunity to endure after impasse for such time as would be reasonable in the circumstances for the employer to take steps to ascertain, upon advice of counsel, that impasse has in fact occurred and to adjust his business operations so as to eliminate the previously immunized restraint.

In no event, however, should immunity continue once the employer has made a unilateral, post-impasse change in the provision at issue. Adoption of such a change (which would constitute an unfair labor practice if made prior to impasse) amounts to a tacit admission that the employer (1) has concluded that impasse has occurred and (2) has had sufficient time to act on that conclusion. Here, respondents' unilateral modification of the Right of First Refusal/Compensation system (see p. 8, *supra*) appears to be just such a unilateral change.

4. The court of appeals' decision, although erroneous, does not conflict with any decision of this Court, nor is there a conflict in the circuits. Moreover, reconciliation of the two fundamental and potentially inconsistent national policies embodied in the antitrust laws and the labor laws necessarily involves some speculation about the practical operation of the collective bargaining process. Thus, the issue involved in this case is one on which additional experience in the lower courts could shed light.

At the same time, the court of appeals' error is a matter of serious consequence. Its unjustified extension of the nonstatutory labor exemption is likely to destabilize labor-management relations and make collective bargaining agreements more difficult to reach. The potential for mischief is quite broad. It includes professional football, which is a multi-billion dollar business, and professional hockey and basketball, where the leagues also impose restraints on player

movement. See *Bridgeman v. National Basketball Ass'n, supra*; *Philadelphia World Hockey Club Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).[7] It includes the entertainment industry generally, which has an economic structure similar to professional sports.[8] And it conceivably includes the more than 600 collective bargaining relationships involving multi-employer associations, which in turn cover more than three million employees. Pet. App. 63a-65a.

Although the district court's order is interlocutory, no issues remain to be resolved on remand that bear on when the nonstatutory labor exemption terminates. Nor will resolution of those issues develop a record that will aid in resolution of that issue. Neither respondents (in appealing to the court of appeals), nor petitioners (who seek review in this Court), have identified any further fact finding necessary to determine the proper accommodation of labor and antitrust policies. We therefore believe that the interlocutory nature of the court of appeals' decision is no obstacle to this Court's review. Cf. *Kansas & Missouri v. Utilicorp United, Inc.*, 110 S. Ct. 2807, 2811 (1990). Finally, it is unlikely that a contract settlement will be reached

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[7] Professional baseball presumably is unaffected, since it is not subject to the antitrust laws. *Flood v. Kuhn*, 407 U.S. 258 (1972).

[8] According to Professor Staudohar, "professional sport is clearly within the ambit of the organized entertainment industry in its industrial relations structure." P. Staudohar, *supra*, at 6-7. "Both [the entertainment industry and professional sports] are subject to the 'star system,' in which exceptionally talented people dominate the worker hierarchy." *Id. at 7.* Like professional league sports, the entertainment industry is characterized by multi-employer bargaining units. *See, e.g., American Broadcasting Co. v. Writers Guild*, 437 U.S. 411, 413-414 (1978) (describing the Association of Motion Picture & Television Producers, Inc., the multi-employer bargaining association representing motion picture and television film producers); *IATSE, Local 659*, 197 N.L.R.B. 1187, 1188 (1972) (describing the Association of Motion Picture Producers, Inc., a multi-employer bargaining unit representing 70 employer-producers), enforced, 477 F.2d 450 (D.C. Cir. 1978); *Barr v. Dramatists Guild, Inc.*, 578 F. Supp. 555,557 (S.D.N.Y. 1983) (describing The League of New York Theaters and Producers, Inc., a multi-employer bargaining unit of theater producers, owners, and operators in New York City).

since the players' union has foresworn its statutes as bargaining representative.[9] On balance, we believe that the petition presents a question of sufficient importance to the proper functioning of the labor and antitrust laws, and to the maintenance of industrial peace, that the Court should not await emergence of a conflict in the circuits before granting review.

CONCLUSION

The petition for a writ of certiorari should be granted.

December 1990

Respectfully submitted,

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[9] On November 6, 1989, five days after the panel's decision, the players' union wrote to the NFL that it "has voted to abandon bargaining rights and begin the decertification process." Pet. App. 62a. On March 30, 1990, the NFL filed suit in district court for a declaratory judgment that the players' union's "purported decertification and abandonment of bargaining rights is ineffective to terminate the labor exemption recognized by the Eighth Circuit." Complaint for Declaratory Judgement at 19, *The Five Smiths, Inc., et al. v. National Football League Players Ass'n*, No. 4-90-CV-261 (D. Minn.).

NATIONAL LABOR RELATIONS BOARD

FOR IMMEDIATE RELEASE (R-2065)
Thursday, April 27, 1995 202/273-1991

BASEBALL AND THE
"SULTAN OF SWAT"
A CONFERENCE COMMEMORATING
THE 100TH BIRTHDAY OF
BABE RUTH

"THE CURSE OF THE BAMBINO"

Delivered by:

William B. Gould IV
Chairman
National Labor Relations Board
Charles A. Beardsley Professor of Law
Stanford Law School (On Leave)

April 27, 1995
Hofstra University
Hempstead, New York

Issuing the injunction before opening day is important to insure that the symbolic value of that day is not tainted by an unfair labor practice and the NLRB's inability to take effective steps against its perpetuation.

Opinion of Judge Sonya Sotomayor, Southern District of New York in *Silverman v. Major League Baseball Players Relations Committee, Inc.*, April 3, 1995.

Like the Constitution, the Flag, and "straight ahead" jazz, baseball, to paraphrase President Clinton, is the "glue" which holds the Nation together. Combining the analytical and cerebral with the country's passion for that which is romantic, it is one of life's eternal verities in which the clock stands still forever, transcending all periods of one's life—a game in which there is no buzzer or horn in the form of an arbitrary or predestined time limitation. Like life itself, it gives one the sense and hope that it could go on forever, but in reality, meanders through streams and corners which defy all earthly predictions.

The "Babe" made the dramatic home run central to this game and the expressions associated with the "roundtripper" as well as the game's other aspects have permeated the entire English language, at least on this side of the Atlantic. And it is certainly appropriate in a paper which addresses the "curse of the Bambino" to note that this tradition of grand majestic long drives has lived on in Red Sox lore over the years, first with Jimmy Foxx—and then, in my memory, in the '40s, '70s and early '80s in the form of Williams, Stephens, York, Doerr, Yaz, Tony C., Rice, Lynn, Scott, Evans and so many others. Canseco, Vaughn and Whiten carry on this great tradition in the new shining season of 1995 which burst forth this week, like spring itself, full of promise, hope and fantasy.

On March 31, the day of Judge Sotomayor's oral bench opinion in the baseball case in which the National Labor Relations Board successfully sought an injunction against alleged owner unfair labor practices, she said:

The often leisurely game of baseball is filled with many small moments which catch a fan's breath. There is, for

example, that wonderful second when you see an outfielder backpedaling and jumping up to the wall, and time stops for an instant as he jumps up and you finally figure out whether it is a home run, a double or a single off the wall, or an out.

More than a quarter of a century before the 1995 baseball case, on a typically warm, humid night in D.C. (later RFK) Stadium, Dick Ellsworth was on the hill for the Red Sox against the hometown Washington Senators, and was tiring in the late innings. But, Dick Williams, the Bosox manager from '67 through '69, had no one in the bullpen to relieve Ellsworth and thus stayed with him as Hank Allen stepped in at the plate with the Senators trailing by two with two-on and two-out in the bottom of the ninth. Allen hit a long shot to deep left center which Reggie Smith, the then Sox center fielder, tracked down and raced to the wall for—and leaped high against the fence.

As he descended to the center field grass, there was that precious moment of which Judge Sotomayor spoke. But in this case, if the ball was over the fence the Senators had won by one run on what the Japanese call a sayonara home run—and if it was caught, the game was over the Red Sox the victors.

Only when the Sox bullpen erupted racing down the left field line and onto the field to greet Smith, as he held the ball high, was the result apparent. This was that breathless inescapable moment . . . .

And on a brisk Oakland, California evening 20 years later a ground ball is hit into the hole between short and third for which Alfredo Griffin ranges far to his right. Griffin turns, as if to throw to first base and the runner from second base advances off the bag, anticipating an effortless capture of the third sack on the throw to first—and in mid-air, with the skill of a ballet dancer, Griffin gracefully twirls and throws to second, eliminating the lead runner from the base paths.

No game is more basic to America's essence than that of baseball. Its elegance and dignity, the big sweep of Burt Blyleven's breaking curve, the heavens opening to the soaring deep fly ball into the distant horizon, as well as the major league pop up which disappears into the stream of brilliant sunshine

and the virtuosity of the double play or "twin killing." And no player is more associated with it than Babe Ruth, the Bambino.

As a young boy, listening to the radio during the 1946 season I heard Ted Williams strike out with the bases loaded—and my father was able to console me with this comment: "It has happened to the Babe also." And Ruth himself said:

> I swing big, with everything I've got. I hit big or I miss big. I like to live as big as I can.

The Babe's early years were in Baltimore where Cal Ripken and Peter Angelos now hold forth. But his major league professional baseball career began with the Red Sox—as a pitcher, who eventually hit 29 homers when switched to the outfield in 1919. And a very fine pitcher he was—particularly in the 1916 and '18 World Series which culminated in the Red Sox last World Championships ever. His ERA's in those two post-seasons of play were 0.64 and 1.06 respectively. In those two Series he pitched 29 2/3 consecutive scoreless innings, a record that was not broken for 43 years!

The sale of Babe Ruth to the Yankees from the Red Sox in 1919 to finance owner H. Harrison Frazee's Broadway ventures, does seem to have placed the "Curse of the Bambino" upon the Red Sox.[1] No world championship has been won by the Townies since then, the ultimate goal having been tantalizingly just missed in the seventh game of the '46, '67, '75 and '86 World Series and in countless other playoffs and tense pennant drives decided on the last day—or, as in 1972, the penultimate day of the season.

I followed every last step of those tense come-from-behind pennant races in '48 and '49 when the Sox, having come back from an enormous deficit, in both seasons, lost the pennant on

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[1] –This theme has been eloquently chronicled in D. Shaughnessy, *The Curse of the Bambino*, (1990). I have found this work to be an informative one, although some of the connections between Ruth and the Red Sox performances in recent years are a bit overdrawn.

the last day—in '48 on a play-off date itself, only to be repeated in '78 when, this time around, a double digit lead had been squandered against the Yankees.

Like Ruth's $125,000 sale itself, those just missed championships remind us not only of Luis Aparicio falling to the ground as he rounded third base in '72, but also the '46 and '49 groundouts of Tom McBride and Tom Wright—and even more important, the deficiencies of the Supreme Court's ruling in 1922 in *Federal Baseball*[2] when Justice Holmes, on one of those bad days that all great baseball players have, concluded that baseball was not a business in interstate commerce within the meaning of the Sherman Antitrust Act. But of course baseball has always been a business—as the National Labor Relations Board recognized when it took jurisdiction over this sport in 1969.[3]

Accordingly, Denny Galehouse would not have been on the mound for the Red Sox in the 1948 play-off game if the St. Louis Browns, like the infinitely more successful 1995 Montreal Expos, had not decided to send their players to big market teams for cash and minor leaguers. Mike Torrez would not have been on the hill in that fateful '78 play-off game in which Bucky Dent homered, had not Andy Messersmith and Dave McNally prevailed in the arbitration case which made them free agents and produced the first of a series of collective bargaining agreements allowing major league players to exercise a measure of free agency.

And had not Carlton Fisk, the hero of the sixth World Series game in 1975 by virtue of the extra inning home run that he figuratively willed fair, been able to become a free agent as the result of the Red Sox failure to tender an offer under the '76 collective agreement, he, rather than Rich Gedman, might have

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[2] *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

[3] *The American League of Professional Baseball Clubs*, 180 NLRB 190, 191 (1969).

been behind the plate in that nightmarish after midnight (by daylight saving time) final inning of the 1986 sixth game and would have then gloved Bob Stanley's inside wild pitch which produced the tying run—and thus would have made Bill Buckner's infamous error anticlimactic.

Nothing has more directly affected baseball's on-the-field developments than the legal developments off-the-field. In 1975 *Messersmith* arbitration decision of Peter Seitz, alongside of the salary arbitration provisions first negotiated in 1973, provided the Players Association with a surrogate for antitrust law which *Federal Baseball* and its progeny had earlier denied them.[4] This is the first of a number of ironies affecting baseball and modern employment and labor law.

The second lies in the fact that *Federal Baseball* was never followed by the courts in other major league professional sports such as football, basketball and hockey. These decisions were influential in establishing unions in these sports because the owners could not avail themselves of the non-statutory labor exemption to antitrust law without a collective bargaining agreement and the players could leverage this liability against them. Accordingly, the antitrust decisions initially gave great impetus to unions and an obligation to recognize and bargain collective bargaining agreements because, in the absence of such agreements, which could provide them with a non-statutory labor exemption, the owners would be liable for antitrust violations for unreasonable restrictions upon player mobility in the form of reserve clauses, draft procedures and the like. By virtue of *Federal Baseball*, and the Supreme Court's affirmance of it in both the *Toolson*[5] and *Curt Flood*[6] decisions, baseball players did not have the same advantage.

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[4] *Professional Baseball Clubs v. Major League Baseball Players Association*, 66 Lab. Arb. (BNA) 101 (1975) (Seitz, Arb.).

[5] *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

[6] *Flood v. Kuhn*, 407 U.S. 258 (1971).

But the second phase of the antitrust decisions dealing with the non-statutory labor exemption has produced a more profound irony. For in at least two circuit courts of appeals—the District of Columbia and the Second Circuit—the courts have said that owners may avail themselves of the labor exemption after having negotiated an agreement, even when unsuccessful in negotiating a subsequent agreement—unless the employment relationship becomes non-union altogether. The result of this is that, as Judge Wald properly noted while dissenting in the recent *Brown v. Pro Football, Inc.*[7] case, the non-statutory labor exemption becomes available only under "bizarre" circumstances i.e., where the union pretends to eliminate itself altogether as the National Football League Players Association did in the wake of the 1987 strike—and as the National Basketball Players Association threatened to do—and then uses the antitrust laws as a vehicle to revive itself for the purpose of negotiating a new agreement and the consequent labor exemption.

The other major result of both *Brown* and *National Basketball Association v. Williams*,[8] decided here in the Second Circuit, is that any kind of balance between the properly competing policies of labor and antitrust laws is eliminated altogether. Thus in football, basketball and presumably hockey, antitrust law and its treble damages remedy is relegated exclusively to the non-union sector, thereby creating an incentive for the players in the major professional sports to be non-union and for employers to foster unionized relationships regardless of their bona fide origin or status—a result which is hardly compatible with the promotion of freedom of association, collective bargaining and autonomous labor-management relationships—goals all enshrined in the National Labor Relations Act.

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[7] *Brown v. Pro Football, Inc.*, _F.3d __, 148 LRRM (BNA) 2769 (D.C. Cir. March 21, 1995).

[8] *National Basketball Association v. Williams*, 45 F.3d 684 (2d Cir. 1995).

In my judgment the new approach to the non-statutory labor exemption is flawed in another major respect as well. It misconceives the role of National Labor Relations Act. National labor law does not provide for balance, parity, or equality of power,[9] as the D.C. Circuit said.[10] Illustrative of this point is the rule which establishes the lawfulness of permanent economic replacements of strikers engaged in protected activity of the Act.[11] Notwithstanding the Court's comment in *American Ship Building* to the effect that the strike and lockout are "correlative," the economic weaponry provided the parties is not equal and, most important, the statute, as interpreted, does not contemplate such equality.

This then is the current backdrop to any discussion about the appropriate relevance of antitrust and labor law to the business of baseball. The Supreme Court, of course, can change both *Brown* and *Williams* and limit the labor exemption to either the point of impasse in the bargaining relationship or, as I have advocated in a book and a couple of articles published during the past fifteen years, at some point subsequent to

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[9] In *Brown*, the court stated that under federal labor policy, there prevails "a delicate balance of countervailing power," which "favors neither party to the collective bargaining process, but instead stocks the arsenals of both unions and employers with economic weapons of roughly equal power." *Brown*, 148 LLRM (BNA) 2769, 2776.

[10] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *American Ship Building v. NLRB*, 380 U.S. 300 (1965).

[11] *NLRB v. Mackey*, 304 U.S. 333 (1938). President Clinton recognized that the balance of economic power is tipped heavily in favor of employers under this rule, leading him to issue an Executive Order banning the Federal Government from contracting with companies that hire permanent replacements during strikes. Executive Order 12954, 60 Fed. Reg. 13023 (March 8, 1995). I have often addressed this troublesome issue myself, most recently in a speech which I gave before the Bar Association of San Francisco on February 25, 1995. See 38 DLR (BNA) A8, Feb. 27, 1995. Of course, in the recently concluded 1994-1995 baseball strike, the owners hired temporary replacements for the striking ballplayers during the spring training exhibition season and have now hired temporary replacements for the umpires during the regular season.

impasse—perhaps a reasonable period of time transpiring in its wake.[12]

The difficulty with either approach, as Justice Harlan remarked in his separate opinion in the *Borg Warner*[13] decision about some of the rules relating to impasse, is that it is inherently vague—a point noted by the Court of Appeals in *Brown*. But this limitation is infinitely preferable to the *untoward policy consequences* involved in eliminating antitrust law from basketball and football as the Courts of Appeals in the District of Columbia and New York have done.

Congress, should it apply antitrust law to baseball—and there is no earthly reason why the same standards should not apply to baseball as other major professional sports—would have to address the labor exemption issue and establish some kind of demarcation line for availability of the exemption and a balance between it and the good faith bargaining objectives contained in the National Labor Relations Act.

Whatever the outcome of the antitrust debate, it is clear that labor law has been extremely relevant to the 1994-1995 strike. The difficulty with the National Labor Relations Act—and this has made the unions in professional sports all the more interested in using antitrust law—is its ineffective remedies and poor procedures.[14] My agency, the National Labor Relations Board, can do little about the ineffectiveness of our remedies because of limitations which have been established by the Supreme Court or the language of the Act itself. It is difficult

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[12] See Berry & Gould , *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 Case W. Res. L. Rev. 685 774 (1981); Gould, *Players and Owners Mix It Up*, 8 California Lawyer 56 (August 1988). See generally, R. Berry, W. Gould and P. Staudohar, *Labor Relations in Professional Sports* (1986).

[13] *NLRB v. Borg Warner*, 356 U.S. 342, 351 (1958).

[14] Gould, *Agenda for Reform: the Future of Employment Relationships and the Law*, (MIT Press) 1993.

for the Board to level the playing field of any relationship within the parameters of existing law.

But there is much that the Board can do within its procedures—particularly with regard to the use of its authority under Section 10(j) to seek temporary injunctive relief against employer and union unfair labor practices. Since I and President Clinton's other NLRB appointees arrived in Washington, D.C. almost 14 months ago, we have used this provision of the law against both employer and union unfair labor practices with unprecedented frequency—a total of 132 times. The purpose is to bypass an unduly time consuming and burdensome administrative process where, by virtue of delay, the relief fashioned would be too late to effectively implement the statute's objectives.

In *Silverman v. Major League Players Association*,[15] the Board voted to authorize the use of temporary injunctive relief to restore the *status quo ante* in the employment relationship which had been altered by virtue of the owners discontinuance of the free agency and salary arbitration system. On March 26, the Board voted to seek injunctive relief against such conduct and, in my view, therefore concluded that there was reasonable cause to believe that this conduct constituted an unfair labor practice and that relief was just and proper—principally because the passage of time would make the remedy, when provided, relatively meaningless.

The Board has no authority to oblige the parties to resume or continue the season—or to fashion an agreement for them. Under our system of voluntary collective bargaining that process is for the parties themselves. The Board's only role is to insure adherence to proper procedures to rid the process of unlawful impediments, and to provide for an appropriate framework for future collective bargaining.

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[15] *Silverman v. Major League Baseball Player Relations Committee*, __ F. Supp. __, 148 LRRM (BNA) 2922 (D. N.Y. Apr. 3, 1995).

If the administrative process was the only avenue available, restored employment conditions might have been realized in the 1997 season. Meanwhile, the 1995 and 1996 seasons might not have taken place—or under circumstances in which quickly eroding baseball skills could not be compensated under processes established voluntarily by labor and management.

Thus, the use of Section 10(j) so as to preserve the *status quo ante* can be particularly significant in established bargaining relationships—as well as in the unorganized sector. It was, as Judge Sotomayor said in her opinion, critical to the 1995 baseball season and a back-to-work agreement. The Board's remedy provided the proper legal framework for future bargaining.

My own judgment is that my agency's use of labor law in the '95 baseball strike may be yet another instance of baseball constituting a mirror image of other societal developments. The most dramatic example of that proposition in my lifetime is the advent of Jackie Robinson at first base for the Brooklyn Dodgers in 1947—and the hiring of Larry Doby and Dan Bankhead soon thereafter. Robinson, who hit .296 playing at an entirely new position in his rookie year, broke baseball's color barrier before President Truman desegregated the Armed Forces and seven years before the Supreme Court's historic ruling in *Brown v. Board of Education* declaring segregation in education to be unconstitutional. The example and contribution of these brave men against odds truly incalculable can never be forgotten.

The Board's reliance upon Section 10(j) injunctions reflects a renewed conviction about our National Labor Relations Act and its purposes, and to the rule of law in the workplace itself. Our weekend work on March 26, and the importance of baseball to our country, made our law and its procedures known to millions who may not have heard of the Board or the Act previously. It was the mirror image of injunctions sought throughout industry in this country and, like Robinson's contribution, it could conceivably influence other relationships.

My hope is that this will trigger more awareness of the law and promote voluntary compliance with its provisions.

In particular, I want to pay tribute here in New York to Regional Director Dan Silverman and his staff who not only played an extremely competent role in investigating the matters brought before us, but also presented the case to Judge Sotomayor. The Board's prompt intervention is properly seen as the vehicle through which the parties put aside their differences and resumed baseball and began the 1995 season this week. Meanwhile, of course, the Board is adjudicating the baseball case on its full merits in its administrative process.

Of course, the owners and players themselves have not yet negotiated a new collective bargaining agreement. It was their failure to do so which triggered the 1994 strike, the longest dispute in the history of professional sports in this country and anywhere in the world! Under our system, these negotiations are for the parties themselves under their own voluntary autonomous system of collective bargaining.

But what the Board and, ultimately the judiciary, have done through the use of Section 10(j) is to create a framework in which the collective bargaining process is fostered. This is the kind of objective that our law was designed to accomplish when first enacted by Congress in 1935 in the form of the Wagner Act. Over the years we have sometimes lost our way because of the failure to use the provisions which give our statute strength.

My belief is that our March 26 determination to seek injunctive relief in the 1995 baseball dispute was consistent with the law, has been good for the game of baseball and its '95 season in particular, and, most significant of all, important to the effective administration of our statute.

As is true of all of American society, we need to have the game of baseball be one in which the interests of all parties—players, owners and fans—are taken into account. This is consistent with the policies of the National Labor Relations Act which my agency administers. A balanced relationship in which genuine voluntary collective bargaining is encouraged

and conflict is diminished is consistent with our national labor policy and with the honor that we appropriately bestow upon Babe Ruth.

This spring of 1995 represents a new season in which a long deep drive was hit for baseball, for effective labor law enforcement, and for so much of what is truly great about our country on this 100th anniversary of the Babe's birth.

SHERMAN ACT

SECTION 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 1 (Supp. V 1993).]

SECTION 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 2 (Supp. V 1993).]

CLAYTON ACT

SECTION 6

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. [15 U.S.C. § 17 (1988).]

SECTION 20

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any

person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means to do so; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. [29 U.S.C. § 52 (1988).]

NORRIS-LAGUARDIA ACT

SECTION 4

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. [29 U.S.C. § 104 (1988).]

WAGNER ACT

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the

free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which

exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as

amended and continued by Senate Joint Resolution 133[1] approved June 14, 1935.

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923,

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[1] So in original.

as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may

designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established,

maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise,

and may take a secret ballot of employees, or utilize any other suitable method to ascertain[1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10(c) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place

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[1] So in original.

and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question

occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such

order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7(a) of the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, sec. 707(a)), as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.

[74TH CONGRESS. SESS. I. CH. 372. JULY 5, 1935.]